Court, U.S.
E D

021493 APR 9 2003

OFFICE OF THE CLERK

No. 02-

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

CHRISTINE A. CUMMINGS; JANET TAYLOR DARVAS; RICHARD K. DEHART; CHRISTOPHER GARBANI; PATRICIA A. MCCUMSEY; DANIEL NOWALIS; CLAUDIA STEWART, AND THE CLASS THEY REPRESENT,

Petitioners,

v.

KATHLEEN CONNELL; MARTY MORGENSTERN; AND CALIFORNIA STATE EMPLOYEES ASSOCIATION, LOCAL 1000, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO-CLC,

Respondents.

On Petition for Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR WRIT OF *CERTIORARI*

W. JAMES YOUNG*
c/o National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

ATTORNEY FOR PETITIONERS
**Counsel of Record*

April 2003

108 pp

QUESTIONS PRESENTED

I. Are public officials who seize agency fees in violation of "the constitutional requirements for the . . . collection of agency fees," *Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986), immune from liability under 42 U.S.C. § 1983?

II. Do public employees possess standing to challenge, as void as against federal constitutional law and public policy, the legality of provisions of the collective bargaining agreements governing their terms and conditions of employment?

III. May public officials agree to be indemnified by a labor union for their liability for violating nonunion public employees' constitutional rights when they seize compulsory union fees in violation of this Court's decision in *Hudson*?

IV. Is a union which fails to satisfy "the constitutional requirements for the Union's collection of agency fees," *Hudson*, 475 U.S. at 310, entitled to retain agency fees seized before compliance or, in the alternative, the nonchargeable portions of the fees seized?

PARTIES TO THE PROCEEDINGS BELOW

There were no parties to the proceedings in the court whose judgment is sought to be reviewed other than those named in the caption.

In addition to those named in the caption, Mona Yassa, an individual employee of the State of California, was initially a party to the proceedings in the District Court. Record ("R.") 1: Complaint, ¶ 6. She was voluntarily dismissed from the action when it was discovered that she was a voluntary union member during the relevant period at issue in this case. R. 55 & 56.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

I. The Facts 4

II. The Proceedings Below 4

REASONS FOR GRANTING THE WRIT 8

I. THE IMPORTANT QUESTIONS AS TO EMPLOYER LIABILITY AND EMPLOYEE STANDING DIRECTLY ADDRESS INDIVIDUALS' ABILITY TO PROTECT THEMSELVES AGAINST GOVERNMENT'S IMPOSITION OF UNLAWFUL TERMS AND CONDITIONS OF EMPLOYMENT 8

TABLE OF CONTENTS — CONTINUED

Page

A. The Conflict with Decisions on the Injury-in-Fact Inflicted by Government Enforcement of Forced-Unionism Schemes 10

1. The Conflict with This Court 11

2. The Conflict Among the Courts 14

B. The Conflict with "Standing" Decisions 15

1. The Conflict with This Court 15

2. The Conflict Among the Circuits 17

II. THERE IS WIDESPREAD CONFLICT AMONG THE CIRCUITS AS TO WHETHER UNIONS MAY INDEMNIFY PUBLIC OFFICIALS FOR ILLEGALLY ENFORCING FORCED-UNIONISM AGREEMENTS 20

III. THE IMPORTANT QUESTION AS TO THE APPROPRIATE REMEDY DIRECTLY ADDRESSES THE CONTINUED VITALITY OF *HUDSON*'S PROTECTIONS 23

A. The Conflict with *Hudson* 23

B. The Conflict Among the Courts 26

IV. THE IMPORTANCE OF THE ISSUES PRESENTED 27

TABLE OF CONTENTS — CONTINUED

Page

CONCLUSION 30

APPENDICES *Page*

A. Decision of the United States Court of Appeals for the Ninth Circuit (9 January 2003), **reported at** 316 F.3d 886 (9th Cir. 2003) 1a

B. Amended Judgment in a Civil Case Entered by the United States District Court for the Eastern District of California (31 July 2001) 23a

C. Memorandum and Order Re Motion to Reconsider or Amend Judgment Entered by the United States District Court for the Eastern District of California (31 July), **reported at** 177 F. Supp. 2d 1060, 1075 (E.D.Cal. 2001) 24a

D. Judgment in a Civil Case Entered by the United States District Court for the Eastern District of California (2 May 2001) 32a

E. Memorandum and Order on Pending Cross-Motions for Summary Judgment Entered by the United States District Court for the Eastern District of California (2 May 2001), **reported at** 177 F. Supp. 2d 1060 (E.D.Cal. 2001) 33a

F. United States Constitution, Article III 57a

TABLE OF CONTENTS — CONTINUED

APPENDICES

Page

G. United States Constitution, First Amendment 58a

H. United States Constitution, Fourteenth Amendment 59a

I. Civil Rights Act of 1871, 42 U.S.C. § 1983 (West Supp. 1999) 60a

J. Ralph C. Dills Act, Cal. Gov't Code § 3513(k) 61a

K. Ralph C. Dills Act, Cal. Gov't Code § 3515 ..... 62a

TABLE OF AUTHORITIES

Cases *Page*

Abood v. Detroit Board of Education,
431 U.S. 209 (1977) ..... *passim*

Air Line Pilots Association v. Miller,
523 U.S. 866 (1998) 12, 27

Allen v. Wright,
468 U.S. 737 (1984) 9

Andrews v. Education Association of Cheshire,
829 F.2d 335 (2d Cir. 1987) 15

Boddie v. Connecticut,
401 U.S. 371 (1971) 24

Brewer v. Lewis,
989 F.2d 1021 (9th Cir. 1993) 19

Browne v. Wisconsin Employment Relations Commission,
169 Wis. 2d 79 (1992) 26, 27

Carey v. Piphus,
435 U.S. 247 (1978) 21

City of Charlotte v. Firefighters Local 660,
426 U.S. 283 (1976) 9

City of Newport v. Fact Concerts, Inc.,
453 U.S. 247 (1981) 21

TABLE OF AUTHORITIES — CONTINUED

Page

Clements v. Fashing,
457 U.S. 957 (1982) 17

Cleveland Board of Education v. Loudermill,
470 U.S. 532 (1985) 24

Clinton v. City of New York,
524 U.S. 417 (1998) 9, 16, 17

Communications Workers of America v. Beck,
487 U.S. 735 (1988) 7, 27, 29

Conley v. Massachusetts Bay Transportation Authority,
405 Mass. 168 (1989) 15

Cramer v. Matish,
924 F.2d 1057 (table), 1990 WL
169640 (6th Cir. 1990) 19, 22

Cummings v. Connell,
163 L.R.R.M. (BNA) 2086 (E.D. Cal. 1999) 2, 5

Dean v. TWA,
924 F.2d 805 (9th Cir. 1991) 27

District of Columbia v. Carter,
409 U.S. 418 (1973) 21

TABLE OF AUTHORITIES — CONTINUED

Page

Ellis v. Railway Clerks,
466 U.S. 435 (1984) 13, 27, 28

Elrod v. Burns,
427 U.S. 347 (1976) 11

Elvin v. Oregon Public Employees Union,
313 Or. 165 (1992) 26

Foster v. Madhesian,
268 F.3d 629 (9th Cir. 2002), *cert. denied sub nom. Foster v. Garcy*, — U.S. —,
122 S. Ct. 2327 (2002) ..... *passim*

Gibney v. Toledo Board of Education,
40 Ohio. St. 3d 152 (1988) 26

Grunwald v. San Bernardino City Unified School District,
994 F.2d 1370 (9th Cir. 1993) 25

Harik v. California Teachers Association,
298 F.3d 863 (9th Cir. 2002) 11, 21, 30

Harrison v. Massachusetts Society of Professors,
405 Mass. 56 (1989) 25

Hohe v. Casey,
956 F.2d 399 (3d Cir. 1992) ..... *passim*

TABLE OF AUTHORITIES — CONTINUED

Page

Hohe v. Casey,
740 F. Supp. 1092 (M.D. Pa. 1989), *rev'd in part*, 956 F.2d 399 (3d Cir. 1992) 18

Hudson v. Teachers Local No. 1,
743 F.2d 1187 (7th Cir 1984),
aff'd, 475 U.S. 292 (1986) 15

Knight v. Kenai Peninsula Borough School District,
131 F.3d 807 (9th Cir. 1997), *cert. denied sub nom. Anchorage Education Association v. Patterson*, 524 U.S. 904 (1998) ..... *passim*

Lehnert v. Ferris Faculty Association,
500 U.S. 507 (1991) 13, 27

Los Angeles v. Lyons,
461 U.S. 95 (1983) 9, 14, 15

Lowary v. Lexington Local Board of Education,
903 F.2d 422 (6th Cir. 1990) 26, 27

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 9, 19

Ex parte McCardle,
7 Wall. 506 (1868) 19

TABLE OF AUTHORITIES — CONTINUED

Page

McGlumphy v. Fraternal Order of Police,
633 F. Supp. 1074 (N.D. Ohio 1986) 25

Mitchum v. Foster,
407 U.S. 225 (1972) 21

Monroe v. Pape,
365 U.S. 167 (1961) 21, 28

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (1950) 24

National Law Center on Homelessness & Poverty v. Kantor,
91 F.3d 178 (D.C. Cir. 1996) 19

National Organization for Women v. Scheidler,
510 U.S. 249 (1994) 19

Northeastern Florida Chapter of the Associated General Contractors of America v. Jacksonville,
508 U.S. 656 (1993) 17

O'Shea v. Littleton,
414 U.S. 488 (1974) 16

Patterson v. American Tobacco Co.,
535 F.2d 257 (4th Cir. 1976) 16

TABLE OF AUTHORITIES — CONTINUED

Page

Perry v. Machinists Local 2569,
708 F.2d 1258 (7th Cir. 1983) 25

Prescott v. County of El Dorado ("Prescott III"),
298 F.3d 844 (9th Cir. 2002), *cert. denied*
— U.S. —, 123 S. Ct. 1251 (2003) ..... *passim*

Prescott v. County of El Dorado ("Prescott I"),
177 F.3d 1102 (9th Cir. 1999), *cert.*
granted, vacated, & remanded, 528 U.S.
1111 (2000), *reinstated in part* ("*Prescott II*"),
204 F.3d 984 (9th Cir. 2000) ..... *passim*

Prescott v. County of El Dorado,
915 F. Supp. 1080 (E.D. Cal. 1996) 25

Regents of University of California v. Bakke,
438 U.S. 265 (1978) 17

Stamford Board of Education v. Stamford Education
Association,
697 F.2d 70 (2d Cir. 1982) 16, 22

Steel Co. v. Citizens for a Better Environment,
523 U.S. 83 (1998) 9, 19

Teachers Local No. 1 v. Hudson,
475 U.S. 292 (1986) ..... *passim*

TABLE OF AUTHORITIES — CONTINUED

Page

Tierney v. City of Toledo,
824 F.2d 1497 (6th Cir. 1987) 15

Turner v. Fouche,
396 U.S. 346 (1970) 17

Valley Forge Christian College v. Americans United for Separation of Church & State,
454 U.S. 464 (1982) 10

Ex parte Virginia,
100 U.S. 339 (1879) 21

Wareham Education Association v. Massachusetts Labor Relations Commission,
430 Mass. 81 (1999) 26

Weaver v. University of Cincinnati,
970 F.2d 1523 (6th Cir. 1992) ..... *passim*

Wessel v. City of Albuquerque,
299 F.3d 1186 (10th Cir. 2002) ..... *passim*

Wilson v. Garcia,
471 U.S. 261 (1985) 28

Wyatt v. Cole,
504 U.S. 158 (1992) 21

TABLE OF AUTHORITIES — CONTINUED

Constitutions, Statutes, and Rules — *Page*

United States Constitution,
art. III 2, 17
amend. I ..... *passim*
amend. XIV 2

Line Item Veto Act,
2 U.S.C. § 691 *et seq.* 17

28 U.S.C. § 1254(1) (West 1993) 2

National Labor Relations Act,
29 U.S.C. § 141 *et seq.* 7
29 U.S.C. § 158(a)(3) 9

Civil Rights Act of 1871,
42 U.S.C. § 1983 ..... *passim*

Civil Rights Attorney's Fees Award Act, 1976,
42 U.S.C. § 1988 ..... 1, 14, 21

Railway Labor Act,
45 U.S.C. § 152, Eleventh 9

Sup. Ct. R. 13.1 2

Ralph C. Dills Act,
Cal. Gov't Code § 3513(a) 4
Cal. Gov't Code § 3513(k) 2, 4, 9
Cal. Gov't Code § 3515 2

TABLE OF AUTHORITIES — CONTINUED

Page

Meyers-Milias-Brown Act,
Cal. Gov't Code § 3502.5(b) 28

Other Authorities

Jeff Canfield, *What a Sham(e): The Broken Beck System in the Real World Workplace*, 47 Wayne L. Rev. 1049 (Fall 2001) 29

Milton L. Chappell, *Seeking a New Foundation: Legislative and Practical Alternatives to the Current Monopoly Bargaining Model That Will Enhance the Viability of Independent Teacher Groups*, 16 Gov't Union Rev. 1 (Summer 1995) 28

1A Martin A. Schwartz & John E. Kirklin, *Section 1983 Litigation: Claims and Defenses* § 1.3 (3d ed. 1997) 21

PETITION FOR WRIT OF *CERTIORARI*

Petitioners Christine A. Cummings, Janet Taylor Darvas, Richard K. DeHart, Christopher Garbani, Patricia A. McCumsey, Daniel Nowalis, Claudia Stewart, and the class they represent, respectfully pray that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on 9 January 2003.

OPINIONS BELOW

The panel opinion sought to be reviewed (Appendix ("App.") A at 1a) is reported at 316 F.3d 886 (9th Cir. 2003). The opinions and orders of the United States District Court for the Eastern District of California on Respondent CSEA's Motion to Reconsider or Amend Judgment (App. C at 24a), and on Petitioners' and Respondents' Cross-Motions for Summary Judgment (App. E at 33a), are reported at 177 F. Supp. 2d 1060 (E.D. Cal. 2001). The amended judgment (App. B at 23a) and original judgment (App. D at 32a) are unreported.

Additionally, the United States District Court for the Eastern District of California issued a number of officially and unofficially reported opinions and orders in this case. Its memorandum and order granting Petitioners' petition for an award pursuant to 42 U.S.C. § 1988 is reported at 177 F. Supp. 2d 1079 (E.D. Cal. 2001). Its denial of Respondent CSEA's first summary judgment motion is unofficially reported at 2000 WL 33599094 (E.D. Cal. 2000). Its memorandum and order denying Petitioners' second motion for a preliminary injunction is unofficially reported at 2000 WL 33599092 (E.D. Cal. 2000). Its memorandum and order granting Petitioners' motions for a preliminary injunction and for class certification is unofficially reported at 163 L.R.R.M. (BNA) 2086 (E.D. Cal. 1999).

JURISDICTION

The Court of Appeals entered its judgment on 9 January 2003. This petition is timely under Supreme Court Rule 13.1. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article III, and the First and Fourteenth Amendments, of the United States Constitution, Title I of the Civil Rights Act of 1871, 42 U.S.C. § 1983, and §§ 3513(k) and 3515 of the California Government Code. Their pertinent text is set out in Appendices F-K at 57a-62a.

STATEMENT OF THE CASE

This case involves the Ninth Circuit's decision shielding public officials from liability when they act in concert with a labor union to deprive public employees of their constitutional rights for that union's financial benefit. Further, it involves the appropriate remedy when a government and a union defy "the constitutional requirements for the . . . collection of agency fees." *Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986).

This civil rights action, brought pursuant to Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, sought and obtained relief to prevent and redress violations of the constitutional rights of Petitioners and the class they represent ("the employees")[1] to be free from unlawful seizures of compulsory union fees. 475 U.S. at 306-10. Applying *Hudson*, the lower courts determined that Respondent California State Employees Association, Local

---

[1] The class numbers approximately 37,000 State employees subjected to agency fee seizures after 2 March 1999. *Cummings v. Connell*, 163 L.R.R.M. (BNA) 2086, 2095 (E.D. Cal. 1999).

1000, Service Employees International Union, AFL-CIO-CLC ("CSEA"), failed to comply fully with *Hudson*'s "constitutional requirements," *id.* at 310, until after Respondent Kathleen Connell, California State Controller, had seized and forwarded to CSEA approximately $14.2 million from the employees' wages over a period of thirteen months.

As part of their lawsuit, the employees sought judgment that Connell violated their constitutional rights by seizing fees for CSEA's benefit, and challenged indemnification provisions of the various collective bargaining agreements ("CBAs") negotiated by Respondent Marty Morgenstern with CSEA, alleging that they are void as against public policy and unenforceable. R. 1, ¶¶ 22 & 55. Both lower courts declined to address that challenge, declaring that the employees lack standing to challenge such a section of the CBAs governing their terms and conditions of employment. *See* App. A at 21a; App. E at 51a-55a. The Ninth Circuit also affirmed the District Court's refusal to enter judgment against Connell and Morgenstern, holding that "a public sector employer who deducts 'fair share' fees from an employee's paycheck is not liable if the union fails to provide adequate notice under *Hudson*." App. A at 18a.

The District Court awarded to the employees that portion of agency fees denominated "nonchargeable" by CSEA, approximately $3 million of the $14.2 million seized from them before CSEA complied with *Hudson*'s requirements. App. E at 45a-46a; App. C at 30a. Reversing, the Ninth Circuit declared that CSEA—which did not comply with *Hudson*'s requirements until after thirteen months of fee seizures—was entitled to collect and use agency fees involuntarily seized by the State on its behalf from public employees' wages, because, albeit tardily (*i.e.*, after being hailed into court and subjected to preliminary injunctive relief), it complied fully with *Hudson*'s disclosure mandates. App. A at

11a-15a. The Ninth Circuit—declaring CSEA's "good faith," exhibited only after the District Court's intervention and eight months of fee seizures—held that the employees were entitled to **no** monetary award unless they objected pursuant to CSEA's untimely notice. App. A at 15a.

I. The Facts.

The employees are nonunion employees of the State of California in nine bargaining units. CSEA is an "employee organization" recognized as their monopoly bargaining representative pursuant to State law. Cal. Gov't Code § 3513(a). CBAs governing each bargaining unit are negotiated and administered on behalf of the State by Morgenstern. App. E at 34a. Since March 1999, these CBAs have subjected employees who do not join CSEA to involuntary seizures—made by Connell—of "agency fees" from their wages, for CSEA's benefit. App. E at 34a; *see* Cal. Gov't Code, §§ 3513(k) & 3515. CSEA agreed in the forced-unionism section of each CBA to indemnify "the State and its agents . . . against any claims made of any nature and against any suit instituted against the State arising from this Article and the deductions arising therefrom." R. 125, ¶ 22.

Beginning in April 1999, Connell began seizing agency fees from the wages of each nonunion employee, continuing to date such fee seizures on a monthly basis. Constitutionally-adequate notice and procedures under *Hudson* were not provided to the employees until May 2000. App. C at 25a.

II. The Proceedings Below.

The employees filed their civil rights lawsuit on 2 November 1999, seeking declaratory and injunctive relief, and damages, on the grounds that Respondents were enforcing their "agency shop" scheme in violation of *Hudson*. The Complaint also alleged that the CBAs' indemnification provisions are void as against public

policy. Shortly thereafter, the District Court enjoined CSEA "from collecting a fair share agency fee," because the employees had raised "serious questions going to the merits" as to CSEA's failure to include an auditor's report in its then-effective notice. The District Court certified Petitioners as representatives of the class of all "potential objectors" under *Hudson*. *Cummings*, 163 L.R.R.M. (BNA) at 2093, 2095; *see Hudson*, 475 U.S. at 306.

More than eight months after the first fee seizures, and more than two months after suit was filed, but within days of the setting and posting of the injunction bond, R. 33 & 40, Connell distributed CSEA's annual audit (but no explanation of its procedures for objection). Respondents simultaneously filed *ex parte* applications seeking dissolution or clarification of the injunction. R. 34-38. The employees opposed. R. 46. When the District Court deemed the injunction's conditions satisfied, they sought a new temporary restraining order and/or a preliminary injunction. R. 43-45. Both were denied. R. 48 & 69.

CSEA issued separate notices in May and June 2000. The May notice purportedly applied to fee seizures occurring over the preceding thirteen months; the June notice was to apply to subsequent fee seizures. Shortly thereafter, CSEA sought summary judgment. R. 73. The employees opposed, pending completion of discovery. R. 85 & 94. Upon its completion, all parties moved for summary judgment. R. 112-128 & 132-158. The District Court entered its Order and Judgment on 2 May 2001, granting and denying the motions in part, and determining that the May and June 2000 notices finally and fully complied with *Hudson*'s requirements. App. D at 32a; App. E at 55a.

The District Court found the four CSEA notices distributed before May 2000 constitutionally infirm. The April and June 1999 notices "did not adequately explain the basis for the fee," because they "failed to provide a copy of the Audit in the absence

of a fee payer's formal request." App. E at 38a. The two notices issued in January 2000 were inadequate because the first "did not provide [employees] with a reasonable opportunity to object," *id.* at 40a, while the second explained CSEA's objection procedure without including financial disclosure. *Id.* at 42a.

Judgment was entered, App. D at 32a, awarding declaratory relief and damages against CSEA, directing refund of nonchargeable fee portions to all nonmembers, but denying restitution of the balance of the fees seized before compliance with *Hudson*'s "constitutional requirements." 475 U.S. at 310. App. E at 45a-46a. The District Court also held that its "award of partial restitution leaves no injury that is redressable against defendants Connell and Morgestern" and that the employees lacked standing to challenge the CBAs' indemnification agreements. *Id.* at 36a n.3 & 51a-55a.

CSEA filed separate motions: (1) to alter or amend the judgment or, in the alternative, for relief from judgment, R. 165; and (2) for relief from judgment. R. 171. The District Court issued a decision, App. C at 24a-31a, and an amended Judgment, App. B at 23a, on 31 July 2001. CSEA timely appealed, R. 182, and the employees timely cross-appealed. R. 185.

In their cross-appeal, the employees unsuccessfully sought reversal of the District Court's: (1) ruling that the employees lack standing to challenge the indemnification clauses in the CBAs; (2) refusal to enter judgment against Connell and Morgenstern; and (3) denial of full restitution. CSEA successfully sought reversal of the District Court's limited award of partial restitution of the nonchargeable portion of the seized fees.

Applying *Foster v. Mahdesian,* 268 F.3d 689, 694 (9th Cir. 2001), *cert. denied sub nom. Foster v. Garcy,* — U.S. —, 122 S. Ct. 2327 (2002), the panel ruled Connell virtually immune from

liability for her "routine collection of fees," declaring "not significant" her distribution of CSEA's constitutionally-inadequate notices. The panel also expressed serious skepticism as to Morgenstern's exposure. App. A at 18a-19a.[2] It then applied *Prescott v. County of El Dorado ("Prescott III")*, 298 F.3d 844, 846 (9th Cir. 2002), *cert. denied* — U.S. —, 123 S. Ct. 1251 (2003), to hold that the employees "lack standing to challenge . . . indemnification clauses" in the CBAs. App. A at 21a.

The panel also denied the employees' request for full restitution of fees seized prior to Respondents' compliance with *Hudson*'s requirements, declaring it foreclosed by *Prescott v. County of El Dorado ("Prescott I")*, 177 F.3d 1102, 1109-10 (9th Cir. 1999), *cert. granted, vacated, & remanded on other grounds*, 528 U.S. 1111 (2000), *reinstated in pertinent part* ("*Prescott II*"), 204 F.3d 984 (9th Cir. 2000). In addition, the panel reversed the District Court's award of partial restitution of the nonchargeable portions of the fee, App. E at 45a-46a, applying private-sector decisions under the National Labor Relations Act, 29 U.S.C. §§ 141 *et seq.*; *see also Communications Workers of America v. Beck*, 487 U.S. 735 (1988). App. A at 11a-15a. Declaring that it "fail[s] to see how plaintiffs suffered any compensable harm (aside from nominal damages) from the initial defective notice," the panel found a notice issued thirteen months after the first fee seizures "adequate to renew the burden on the plaintiffs to object." It declared "overbroad" the limited remedy denying to CSEA only monies spent on political, ideological, and other non-bargaining activities. *Id.* at 15a.

---

[2] Obviously, Morgenstern's participation was necessary to obtain appropriate relief as to the CBA's indemnification provisions, to-wit: declaratory judgment that they are void as against public policy; an injunction against their negotiation and enforcement; and their expunction from existing State/CSEA CBAs. R. 1: Complaint, ¶ 55.

REASONS FOR GRANTING THE WRIT

I. THE IMPORTANT QUESTIONS AS TO EMPLOYER LIABILITY AND EMPLOYEE STANDING DIRECTLY ADDRESS INDIVIDUALS' ABILITY TO PROTECT THEMSELVES AGAINST GOVERNMENT'S IMPOSITION OF UNLAWFUL TERMS AND CONDITIONS OF EMPLOYMENT.

The decision below on the first three questions presented, based upon other recent Ninth Circuit decisions, rejects this Court's well-established jurisprudence regarding public official liability under 42 U.S.C. § 1983, generally, and in the context of public-sector forced-unionism, particularly.

The panel declared Connell's "routine collection of agency fees" to be virtually immune from judicial scrutiny, App. A at 18a, quoting *Foster*, 268 F.3d at 693, because it "does not trigger a duty . . . to ensure that every employee has received a proper *Hudson* notice." 268 F.3d at 693. But the panel disregards this Court's admonition that "the government and union have a responsibility to provide procedures that minimize th[e] impingement [on First Amendment rights] and that facilitate a nonunion employee's ability to protect his rights" by compliance with "the constitutional requirements for the . . . collection of agency fees. *Hudson*, 475 U.S. at 307 n.20 & 310. More importantly, the panel begs the important question of a public official's appropriate response when *Hudson*'s standards are ignored, or defied.

The flaw in the panel's conclusion arises from the unstated premise underlying Ninth Circuit decisionmaking on this issue: that monopoly bargaining representatives possess some inchoate claim against a portion of nonmembers' wages. This premise confuses political argument with sound legal principle.

This Court's decisionmaking is to the contrary. The monopoly bargaining privilege is statutory. Unions possess no

entitlement or authority to bargain exclusively or collectively with a public employer. *City of Charlotte v. Firefighters Local 660*, 426 U.S. 283, 286-88 (1976). Likewise, the authority to compel nonmembers' support of a union is a statutory privilege, not an inchoate right inherent in the monopoly bargaining privilege. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 223-25 (1977) (explaining governmental interests justifying allowance of agency shop). Two conditions precedent—statutory and contractual[3]—must be satisfied before forced dues may be exacted from nonunion public employees. This Court in *Hudson* added a third category of conditions: "the constitutional requirements for the . . . **collection** of agency fees." 475 U.S. at 310 (emphasis added). Absent satisfaction of all of these requirements—including the last—there is no authority to exact monies from nonunion public employees.

The Ninth Circuit's grant of immunity to public officials, App. A at 18a, quoting *Foster*, 268 F.3d at 693, is of a piece with its determination that employees lack standing to challenge one of the terms and conditions of the CBA governing their employment (here, the indemnification provision).

This Court frequently addresses standing questions. *See, i.e.*, *Clinton v. City of New York*, 524 U.S. 417 (1998); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Allen v. Wright*, 468 U.S. 737 (1984); *Los Angeles v. Lyons*, 461 U.S. 95 (1983). In these cases, among many others, this Court has repeated the tripartite showing required to establish standing: "A plaintiff must allege [1] personal injury [2] fairly traceable to the defendant's allegedly

---

[3] Cal. Gov't Code § 3513(k), App. J at 61a, permits forced-unionism clauses, but does not require them. *See also* 29 U.S.C. § 158(a)(3) (same); 45 U.S.C. § 152, Eleventh (same).

unlawful conduct and [3] likely to be redressed by the requested relief." *Allen*, 468 U.S. at 751 (citing *Valley Forge Christian Coll. v. Americans United*, 454 U.S. 464, 471-76 (1982)).

By misdefining the employees' injury, the Ninth Circuit has written out of civil rights law government officials' liability, rendering nonexistent any meaningful duty to refrain from violating nonunion public employees' constitutional rights. This result ignores this Court's clearly-enunciated standards, *see Hudson*, 475 U.S. at 307 n.20 ("the government and union have a responsibility"), as well as those of virtually every other Circuit addressing this issue. Consequently, the employees face the prospect of future violations of their constitutional rights by both illegal agency fee seizures absent compliance with the "constitutional requirements for the . . . collection of agency fees," *id.* at 310, and by compelled subsidization of the public employer's defense against their successful lawsuit challenging past violations of their constitutional rights.

A. The Conflict with Decisions on the Injury-in-Fact Inflicted by Government Enforcement of Forced-Unionism Schemes.

The panel's decision conflicts with this Court's standing decisions, because it conflicts with this Court's forced-unionism jurisprudence. Although nonunion employees are injured by the public employer's seizure of agency fees from their wages, the Ninth Circuit has radically abstracted their injury, attributing their "injury in fact" to inadequate notice under *Hudson*. *Prescott III*, 298 F.3d at 845. Like the panel in *Prescott III*, the panel here premised its decision on the untenable proposition that the contents of a union's notice—rather than Connell's seizure of their property—injures employees.

The Ninth Circuit has applied this analysis in a series of cases, beginning with its first *Prescott* decision, 177 F.3d at 1111-12, culminating in its decision on remand. 298 F.3d at 846; *see Foster*, 268 F.3d at 694; *Harik v. California Teachers Ass'n*, 298 F.3d 863, 870 (9th Cir. 2002) (reversing judgment against public officials for seizing fees absent *Hudson* compliance).

The panel's conclusion defies this Court's mandate that a public employer has responsibility, before it seizes fees from "potential objectors," to ensure that *Hudson*'s standards are satisfied. *Hudson*, 475 U.S. at 306-07 & n.20; *see also Knight v. Kenai Peninsula Borough Sch. Dist.*, 131 F.3d 807, 817 (9th Cir. 1997) (miscast by both the *Foster* and the *Prescott III* panels).

1. The Conflict with This Court.

Hudson holds that an employer's seizure, not the union's expenditure, of nonmembers' fees is the constitutionally-injurious act. Proceeding from the principle "that requiring nonunion employees to support their collective-bargaining representative 'has an impact upon their First Amendment interests,'" this Court identified the constitutional infringement in any forced-unionism scheme. *Hudson*, 475 U.S. at 301, quoting *Abood*, 431 U.S. at 222. Holding that "the agency shop itself impinges on the nonunion employees' First Amendment interests," this Court required an "appropriately justified advance reduction" of the fee. 475 U.S. at 309. That it is the taking of their property which injures the nonmembers' constitutional rights was cemented by this Court's holding establishing "the constitutional requirements for the . . . **collection** of agency fees." *Id.* at 310 (emphasis added); *cf. Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury") .

While declining to consider the case "through the prism of the procedural due process protections necessary for deprivations of property," this Court recognized that the infringement is dual, because "the procedures required by the First Amendment also provide the protections necessary for any deprivation of property." *Hudson*, 475 U.S. at 304 n.13. It therefore rejected the union's argument that escrow of all monies seized addresses "any valid constitutional objection to [its] procedure." *Id.* at 309; *see also ALPA v. Miller*, 523 U.S. 866, 876 n.4 (1998) (rejecting *amicus*' argument that "[i]llegality depends on the *spending* of compelled agency fees for ideological purposes . . . not simply the initial collection of those fees") (original emphasis).

Furthermore, the Ninth Circuit's rejection of public official liability disregards the government's duty to refrain from unconstitutional conduct, and government culpability for its unconstitutional seizure of "agency fees" from nonunion public employees. This Court unambiguously declared in *Hudson* that "the **government** and union" share "responsibility" when they enter into and enforce a forced-unionism provision, 475 U.S. at 307 n.20 (emphasis added). Nevertheless, another Ninth Circuit panel—relied upon by the panel below, App. A at 21a—discarded that conclusive affirmance of **government** responsibility in favor of a construction of § 1983 embracing the proposition that "the routine deduction of fees by the [government] employer," does not injure employees when the necessary notice and procedural protections have not been provided. *Foster*, 268 F.3d at 694.

As in *Prescott* and *Foster*, the panel elevated state statutory policy ostensibly favoring agency fee seizures, *id.*, over the federal constitutional policy barring fee seizures absent compliance with *Hudson*.

Distribution of an inadequate *Hudson* notice is not what injures employees, as the Ninth Circuit assumes. *Prescott III*, 298

F.3d at 846. Rather, nonmembers are injured by the seizure of agency fees, an act committed solely by the public employer and/or its officials (here, by Connell). The Ninth Circuit's refusal to acknowledge this point underlies its peculiar views as to standing: "The challenged indemnification clause upon which the employer insisted caused neither the union to furnish, nor the plaintiffs to receive, inadequate notice." *Id.* The Ninth Circuit refuses to acknowledge that the indemnification clause immunizes public officials against the consequences of their actions causing constitutional harm, *i.e.*, seizing agency fees from the employees' wages.

Having miscast the "injury" suffered by the employees from whom forced union dues are seized, the Ninth Circuit consequently ignores the palpable and direct effect of the indemnification agreement in the seizure of agency fees. Moreover, the court ignores the real and imminent prospect of **additional** financial injury (beyond the past illegal seizures of agency fees), insofar as the employees remain subject to the CBAs, and the prospect that CSEA will treat its expenses in indemnifying public officials as chargeable to nonmembers.

This Court has consistently recognized the First Amendment repercussions of forced-unionism schemes. *Hudson*, 475 U.S. at 301 (quoting *Abood*, 431 U.S. at 222); *see also Abood*, 431 U.S. at 255 (Powell, J., concurring); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 517-19 (1991); *see also Ellis v. Railway Clerks*, 466 U.S. 435, 447, 455-56 (1984) ("by allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights"; "[t]he First Amendment does limit the uses to which the union can put funds obtained from dissenting employees"). The coerced subsidization imposed by indemnification provisions in cases such as this serves no legitimate governmental interest, but seriously "impact[s]" the employees' First

Amendment rights. *Hudson*, 475 U.S. at 301; *cf.* 42 U.S.C. § 1988 (fee-shifting provisions).

When it adopted the "injury-because-*Hudson*-was-not-followed" reasoning in *Prescott III*, 298 F.3d at 845-46, the Ninth Circuit ignored the tangible prospect of the employees' economic injury in CSEA's promise to indemnify Connell and Morgenstern for the costs of their defense of this lawsuit. The CBAs thus add to the injury of Connell's unlawful seizure of agency fees the insult of requiring the employees to subsidize Connell's financial liability for that injury. Certainly, the prospect of that injury is sufficient to confer upon the employees standing to challenge the legality of the indemnification agreement. *Lyons*, 461 U.S. at 111.

2. The Conflict Among the Courts.

The Ninth Circuit's decision conflicts with decisions of four other Circuits,[4] and one state supreme court, which have held public employers liable for seizing agency fees absent compliance with *Hudson*'s requirements. No other Circuit has adopted the Ninth Circuit's view.

A public employer's duty to refrain from inflicting constitutional harm by seizing fees is unanimously recognized in the Third, Sixth, Seventh, and Tenth Circuits, the only other Circuits to consider the question. *Wessel v. City of Albuquerque*, 299 F.3d 1186, 1197-99 (10th Cir. 2002) ("That a public employer has certain obligations within the fair share deduction framework established by courts is beyond dispute"); *Hohe v.*

---

[4] There is good cause to believe that it defies existing Ninth Circuit precedent, since the public employer's responsibility was previously recognized in *Knight*, 131 F.3d at 817, based upon *Hudson*, 475 U.S. at 307 n.20.

Casey, 956 F.2d 399, 405-06, 411 (3d Cir. 1992) ("the employer and the union must have a constitutional procedure in place before deducting fees"); *Tierney v. City of Toledo*, 824 F.2d 1497, 1504, 1507 (6th Cir. 1987) ("no . . . employer may take any action to enforce a . . . duty to pay any dues, . . . through a deduction from wages," absent *Hudson* compliance); *Weaver v. University of Cincinnati*, 970 F.2d 1523, 1538 (6th Cir. 1992) ("a public employer ha[s] duties separate and apart from those of the union"); *Hudson v. Teachers Local No. 1*, 743 F.2d 1187, 1191 (7th Cir. 1984) (public agency liable), *aff'd*, 475 U.S. 292 (1986); *see also Andrews v. Education Ass'n of Cheshire*, 829 F.2d 335, 339 (2d Cir. 1987) (*Hudson* "mandated that the unions and government use a narrowly drawn plan that protects the nonmembers' first amendment interests"). Likewise, the Supreme Judicial Court of Massachusetts recognizes that "an employer cannot ignore an employee's assertion of a constitutionally protected right which is valid on its face." *Conley v. Massachusetts Bay Transp. Auth.*, 405 Mass. 168, 177 (1989).

This Court should grant *certiorari* to address the Ninth Circuit's deviation from this Court's jurisprudence, and that of virtually every other court, as to the injury-in-fact suffered by nonunion employees subject to the diminution of their compensation resulting from public officials' enforcement of forced-unionism schemes, and as to public officials' liability when they act in league with a labor union to enforce such a requirement.

B. The Conflict with "Standing" Decisions.

1. The Conflict with This Court.

Insofar as the employees seek prospective declaratory and injunctive relief that Respondents' indemnification scheme is void as against public policy, the Ninth Circuit failed to analyze properly the employees' standing under *Lyons*. *Lyons* holds that

litigants seeking such relief demonstrate standing when they show a "real or immediate threat that [they] will be wronged again—a 'likelihood of substantial and immediate irreparable injury.'" 461 U.S. at 111 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974)). The employees in the bargaining units remain subject to the CBAs' forced-unionism provisions, and satisfy these requirements. Nevertheless, because "[t]he remedy the plaintiffs seek, invalidation of the indemnification clause, does not compensate plaintiffs for past violations of *Hudson,* nor does it prevent future violations," as it wrongly defines them, the Ninth Circuit has declared that the employees failed to meet "the redressability requirement for standing." *Prescott III*, 298 F.3d at 846.

The Second Circuit struck down a similar indemnification provision in *Stamford Board of Education v. Stamford Education Association*, 697 F.2d 70, 74 (2d Cir. 1982), citing the union's payment of the public employer's liability for damages for entering into an unlawful agreement and the derivation of that payment from, "at least in part, funds collected as dues from the plaintiffs themselves or from members of the plaintiff class." *Id.* (citing *Patterson v. American Tobacco Co.*, 535 F.2d 257, 269 (4th Cir. 1976) (union may not bargain away minority employees' right to equal treatment)). Similarly, the employees here face the very real prospect of subsidizing the opposition to their own lawsuit, if CSEA indemnifies Connell and Morgenstern and charges bargaining unit employees for those costs. *See also Clinton*, 524 U.S. at 429-30. Rejecting the argument that there was no "actual injury [to the City] because the claims are too speculative," this Court in *Clinton* compared a President's exercise of his authority to setting aside a defense verdict on appeal, with remand for a new trial of a multibillion dollar damage claim: "[e]ven if the outcome of the second trial is speculative, the reversal, like the President's cancellation, causes a significant immediate injury by depriving the defendant of the benefit of a

favorable final judgment." *Clinton*, 524 U.S. at 429-30 (allowing challenge to the Line Item Veto Act, 2 U.S.C. § 691 *et seq.*)

The courts below were presented with the fact that an indemnification provision necessarily lowers indemnitees' exposure, thereby creating disincentives to the public officials' protection of the employees' constitutional rights. If "denial of a benefit in the bargaining process can itself create an Article III injury, irrespective of the end result," 524 U.S. at 433 n.22 (citing *Northeastern Florida Chapter of the Associated General Contractors of America v. Jacksonville*, 508 U.S. 656, 666 (1993)), then certainly achievement of a term in the bargaining process likewise inflicts an Article III injury.[5]

2. The Conflict Among the Circuits.

In addition to the Ninth Circuit in this case, three other courts of appeals have addressed indemnification in the context of forced-unionism agreements. *See Wessel*, 299 F.3d at 1197-99 (Tenth); *Weaver*, 970 F.2d at 1536-38 (Sixth); *Hohe*, 956 F.2d at 411-12 (Third); *see also Knight*, 131 F.3d at 817 (Ninth; addressing similar merits challenge to indemnification provi-

---

[5] The employees need not demonstrate that Connell would have eschewed fee seizures absent the indemnification provision to establish their standing. This Court has repeatedly refused to impose such a requirement. *Jacksonville*, 508 U.S. at 664-65 (citing *Turner v. Fouche*, 396 U.S. 346, 361 (1970)); *see also Clements v. Fashing*, 457 U.S. 957 (1982) (dispute not "merely hypothetical" because litigants could not show they would have been elected but for "automatic resignation" provisions of Texas state constitution); *Regents of University of California v. Bakke*, 438 U.S. 265, 281 n.14 (1978) (requisite injury shown by refusal of state to allow litigant to compete for benefit sought).

sions).[6] None has eluded the merits by adopting the position of *Prescott III*, followed by the panel below.

Most recently, in *Wessel*, the Tenth Circuit specifically criticized and rejected the Ninth Circuit's approach in *Prescott I*, 177 F.3d at 1112. There, the court referred to the Ninth Circuit's erroneous identification of the injury, noting that:

> [t]he alleged injury results from the indemnification provision's negation of any incentive for the City to ensure that the *Hudson* requirements were followed. The nonmembers' entire argument presumes that, if the City faced potential liability, it would have prevented the fair share fees from being deducted unconstitutionally from the nonmembers' paychecks.

299 F.3d at 1199 n.3.

The Third Circuit addressed a similar challenge in *Hohe*, 956 F.2d at 411-12. There, the district court rejected the challenge on standing grounds. In a footnote to a simultaneous rejection on standing grounds of the challenge to the facial validity of a statute requiring fee seizures absent *Hudson* compliance, the court stated that, "[f]or the same reasons we also reach that conclusion with respect to the indemnification clause in the [CBA]." *Hohe v. Casey*, 740 F. Supp. 1092, 1098-99 & n.5 (M.D. Pa. 1989), *rev'd in pertinent part*, 956 F.2d 399, 412 (3d Cir. 1992).

---

[6] The district court in *Knight* "quickly disposed of" an identical challenge to nonunion employees' standing. Petition for a Writ of *Certiorari*, *Anchorage Educ. Ass'n v. Patterson*, No. 97-1454, App. C at 47a. However, perhaps recognizing *Knight*'s conclusion, *Prescott III* views *Knight* through the prism of *Foster*, which declared that the seizure of fees is not an "adverse action" under *Knight*, 131 F.3d at 817. *Foster*, 268 F.3d at 694.

On appeal, the *Hohe* nonmembers argued that the indemnification clause "is void as against public policy." 956 F.2d at 411. The Third Circuit explicitly held that employees subject to a monopoly bargaining agreement possess standing to challenge its terms: "We find ourselves in disagreement with the ruling of the district court that it need not decide this issue. We say so because we think the theory advanced by the plaintiffs' attack on the clause raises a cognizable legal issue." *Id.* at 412.

The Sixth Circuit in *Weaver* likewise addressed the merits in a challenge to an indemnification clause, in a discussion devoid of any suggestion that employees lack standing. 970 F.2d at 1536-38; *see also Cramer v. Matish*, 924 F.2d 1057 (table), 1990 WL 169640 (6th Cir. 1990) (same). The court found it sufficient that the clause "protect[s] the University from any financial consequences of going along with procedures selected by the union that fail to comply with the constitutional standards enunciated in *Hudson*." 970 F.2d at 1538.

Any federal court's merits judgment presupposes determination that the parties possess the requisite standing. *National Org. for Women v. Scheidler*, 510 U.S. 249, 255 (1994) (standing is open to review at all stages of the litigation); *cf. Brewer v. Lewis*, 989 F.2d 1021, 1025 (9th Cir. 1993) (standing is a jurisdictional question that must be addressed at threshold of any case). It is "an indispensable part of the plaintiff's case." *Lujan*, 504 U.S. at 561. When a party lacks standing, there is no case or controversy, and the court lacks jurisdiction. As this Court recently reaffirmed, "'Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'" *Steel Co.*, 523 U.S. at 94 (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1868)); *see also National Law Center on Homelessness & Poverty v. Kantor*, 91 F.3d 178, 180 (D.C. Cir. 1996). Thus, implicit in the

Sixth Circuit's merits determination in *Weaver* is the conclusion that it possessed jurisdiction to decide the issue presented to it.

This Court should grant *certiorari* to settle the conflict among the circuits as to whether employees subject to a forced-unionism provision possess standing to challenge the legality of an indemnification clause in that agreement.

II. THERE IS WIDESPREAD CONFLICT AMONG THE CIRCUITS AS TO WHETHER UNIONS MAY INDEMNIFY PUBLIC OFFICIALS FOR ILLEGALLY ENFORCING FORCED-UNIONISM AGREEMENTS.

Like this case, *Hudson* was brought pursuant to 42 U.S.C. § 1983. 475 U.S. at 298 n.3. *Hudson* addressed "whether the [agency shop] procedure used by [a union] and approved by [a public employer] adequately protects the basic distinction drawn in *Abood*" between "'devis[ing] a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.'" *Id.* at 302 (quoting *Abood*, 431 U.S. at 237). "[A]nalyz[ing] the problem from the perspective of the First Amendment concerns," 475 U.S. at 304 n.13, this Court set forth three "constitutional requirements for the . . . collection of agency fees." *Id.* at 310. The Court specifically stated that, in this context, both "**the government** and union have a responsibility to provide procedures that minimize that impingement [on First Amendment rights] and that facilitate a nonunion employee's ability to protect his rights." *Id.* at 307 n.20 (emphasis added).

Under this articulation of government responsibility, public officials may not, without violating constitutional norms, seize agency fees from nonmember employees on behalf of a union absent strict adherence to these "constitutional requirements." *Id.*

at 310. Doing so injures the employees. Nevertheless, the Ninth Circuit has rejected this Court's decisionmaking here, App. A at 19a, and in three other cases that write government liability out of § 1983 law. *Prescott III*, 298 F.3d at 846; *Foster*, 268 F.3d at 694; *Harik*, 298 F.3d at 870.

Section 1983 creates a remedy "against those who representing a State in some capacity were ***unable*** or ***unwilling*** to enforce a state law," *Monroe v. Pape*, 365 U.S. 167, 176 (1961) (original emphasis); *see also District of Columbia v. Carter*, 409 U.S. 418, 426 (1973), with the purpose of "protect[ing] the people from unconstitutional action under color of state law 'whether that action be executive, legislative, or judicial.'" *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1879)); *see generally* 1A Martin A. Schwartz & John E. Kirklin, *Section 1983 Litigation: Claims and Defenses* § 1.3 (3d ed. 1997).

Thus, state and local governments bear non-delegable responsibility for their "constitutional torts." 42 U.S.C. §§ 1983, 1988. The purpose of § 1983 is "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992) (citing *Carey v. Piphus*, 435 U.S. 247, 254-57 (1978)); *see also City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268 (1981) (deterrence of future abuses of power is an important purpose of this section). Similar purpose is implicit in the fee-shifting provisions of § 1988.

The courts of appeals are in deep conflict over whether labor unions may agree to indemnify public officials against any liability arising out of the unlawful enforcement of forced-unionism provisions. The Ninth Circuit has four times eluded this issue, but four other circuits have confronted it, three in this specific context.

Only the Third Circuit has found such agreements permissible. *Hohe*, 956 F.2d at 411-12. When the Third Circuit addressed this controversial issue, the Second Circuit had already addressed it in another context, *Stamford*, 697 F.2d at 73-75, and the Sixth Circuit already had addressed it in this context in its unpublished *Cramer* opinion. *Cramer* held an indemnification provision void as against public policy because, "[u]nder *Hudson*, the public employer, not the union, has the primary duty to ensure that the plan is constitutionally valid." "[C]lauses in [CBAs] which purport to relieve public employers from liability for violations of federal constitutional and civil rights are void as against public policy." *Cramer*, 1990 WL 169640, at *4 (following *Stamford*). *Cramer* concluded that, "[w]ithout such a role, public employe[r]s would have **no incentive** to fulfill their constitutional duties." *Id.* (emphasis added).

The Third Circuit declined to follow *Stamford* and *Cramer*. *Hohe*, 956 F.2d at 411 (citing *Cramer* and others). Shortly after *Hohe*, the Sixth Circuit addressed the issue again, in *Weaver*. *Weaver* found *Stamford*'s reasoning more persuasive than *Hohe*'s, declaring that "the indemnification agreement . . . was repugnant to public policy, and therefore, invalid," for two reasons. First, the clause "protect[s] the university from any financial consequences of going along with procedures selected by the union that fail to comply with the constitutional standards enunciated in *Hudson*." Second, the court recognized that "the university as a public employer had duties separate and apart from those of the union." *Weaver*, 970 F.2d at 1538 (citations omitted). The Sixth Circuit concluded that a "clause that relieves the employer of all consequences for its failure to assume and conscientiously carry out its duties, including even the cost of defending legal actions, is against public policy." *Id.*

Most recently, the Tenth Circuit in *Wessel* adopted the majority view that indemnification clauses in this context are void as against public policy. *Wessel* rejected the assertion that a public employer can "do little, if anything, to detect and prevent" *Hudson* violations. 299 F.3d at 1197. *Wessel* concluded that "if the Supreme Court had only been concerned with the union's ability to carry out the *Hudson* requirements, it would not have placed the burden on both parties." *Id.* at 1198 (citing *Hudson*, 475 U.S. at 307 n.20).

III. The Important Question as to the Appropriate Remedy Directly Addresses the Continued Vitality of *Hudson*'s Protections.

A. The Conflict with *Hudson*.

While *Hudson* declined to specify the appropriate remedy, implicit in its holding is the conclusion that failure to comply with the "constitutional requirements" means that a union may not "collect[]" fees. 475 U.S. at 310. In contrast, the Ninth Circuit's reversal of the award of partial restitution is premised upon the concept that agency fee seizures absent *Hudson* compliance can be "cured" by post-seizure notice and procedures. Both theoretical and practical considerations doom this concept.

First, a subsequent notice cannot, by hypothesis, "cure" failure to provide notice, since a notice requirement inherently presupposes a temporal component.[7] *Hudson* imposes this

---

[7] For this reason, in part, this Court rejected similar arguments, holding that violators cannot escape liability by issuing the notice adequate as to its content and procedures after being sued. *Hudson*, 475 U.S. at 305 n.14 ("we consider the procedure as it was presented to the District Court"); *see also Knight*, 131 F.3d at 811-12, 814-15 (reversing two district court decisions deeming "moot" nonmembers' claims about an illegal demand for payment of agency fees).

component with its declaration of "the constitutional requirements for the . . . **collection** of agency fees," thus mandating that adequate notice and procedures **precede** agency fee seizures. *Id.* (emphasis added); *see also id.* at 305, quoting *Abood*, 431 U.S. at 244 (Stevens, J., concurring) (reaffirming principle that "'the Union should not be permitted to **exact** a service fee from nonmembers without **first** establishing a procedure'") (emphasis added). Thus, the Court mandated an "advance reduction of dues" presupposing pre-seizure calculation and notice. 475 U.S. at 304, 306, 309 (three references); *see also id.* at 305-06 ("A forced exaction followed by a rebate equal to the amount improperly expended is . . . not a permissible response to the nonunion employees' objections").

This conclusion is confirmed by *Hudson*'s context as a limited exception to the rule that an "essential principle of due process is that a deprivation of life, liberty, or property 'be **preceded** by notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (emphasis added). This is the normal constitutional principle: "'the root requirement' of the Due Process Clause [is] 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.'" *Loudermill*, 470 U.S. at 542 (original emphasis), quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971).

Coupled with the content-based regulation of speech that is the imposition of an "agency shop" and its consequent triggering of "strict scrutiny," *Hudson*'s requirements must be analyzed through the narrowest prism. The license for unions and public employers to seize public employees' property absent pre-seizure "opportunity for hearing" must be construed through its own strict limitations, which require adequate financial disclosure

calculating an "advance reduction of dues," subject to "verification by an independent auditor," 475 U.S. at 307 n.18, prior to any "collection of agency fees." *Id.* at 310. Thus, the notion that public-employee labor unions can "cure" failure to comply with *Hudson*'s requirements simply by issuing a new constitutionally-adequate notice when hailed into court by the employees whose rights have been violated by illegal fee seizures fails in light of this Court's First-Amendment jurisprudence.

Furthermore, this Court mandated that unions escrow "potential objectors" monies pending "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker," in which "to have his objections addressed in an expeditious, fair, and objective manner." *Id.* Practically, a tardy notice can "cure" neither of these failures.[8] At most, such a belated notice can provide, tardily, the requisite financial disclosure. However, it cannot retroactively escrow—and therefore prevent the involuntary use of—monies "reasonably in dispute" or, here, render any review "reasonably prompt" in relation to the fee seizures. Thus, the Ninth Circuit's premise overlooks two important elements of *Hudson*'s mandate.

---

[8] The Ninth Circuit has indicated that a four-to-five month delay is permissible. *Grunwald v. San Bernardino City Unified Sch. Dist.*, 994 F.2d 1370, 1372, 1377 (9th Cir. 1993). Other courts have held similar or longer delays to be impermissible. *Harrison v. Massachusetts Soc. of Professors*, 405 Mass. 56, 66 (1989) (Mass. 1989) (150-day delay impermissible); *Prescott v. County of El Dorado*, 915 F. Supp. 1080, 1091 (E.D. Cal. 1996) (year-long delay impermissible); *McGlumphy v. Fraternal Order of Police*, 633 F. Supp. 1074, 1083 (N.D. Ohio 1986) (year-long delay impermissible); *see also Perry v. Machinists Local 2569*, 708 F.2d 1258, 1262 (7th Cir. 1983) (eighteen months before refund "cumbersome" and "unfair").

B. The Conflict Among the Courts.

The Circuits and state courts are deeply divided as to the appropriate monetary remedy when fees are seized in violation of *Hudson*. The Ninth Circuit's ruling on full restitution admittedly represents a majority view among the courts of appeals (one which disregards this Court's mandates, *see* § III(A), *supra*). However, its reversal of the award of partial restitution is a distinctly minority view, contrary to the views of other Circuits and courts, and even other panels within the Ninth Circuit.

Predicated upon a view of union entitlement to nonmembers' fees, three circuits and one state supreme court deem full restitution inappropriate when fees are seized in violation of *Hudson*'s "constitutional requirements." *Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 432-33 (6th Cir. 1990); *Weaver*, 970 F.2d at 1533-34; *Gilpin v. AFSCME*, 875 F.2d 1310, 1313-14 (7th Cir. 1989); *Wessel*, 299 F.3d at 1194-95; *Browne v. Wisconsin Employment Relations Comm'n*, 169 Wis. 2d 79, 130-34 (1992); *cf. Prescott I*, 177 F.3d at 1109 (same).

On the other hand, three state supreme courts have affirmed awards of full restitution. *Elvin v. Oregon Pub. Employees Union*, 313 Or. 165, 176-80 (1992) (affirming administrative award); *Wareham Educ. Ass'n v. Massachusetts Labor Relations Comm'n*, 430 Mass. 81, 89-90 (1999) (granting restitution where no audit supplied); *Gibney v. Toledo Bd. of Educ.*, 40 Ohio. St. 3d 152, 157-58 (1988). Moreover, the Ninth Circuit has held that a union which "failed to satisfy *Hudson*'s requirements . . . was not entitled to the fees that it collected." *Knight*, 131 F.3d at 815;[9]

---

[9] Like *Prescott I*, the panel declared that *Knight* "said the union was not entitled to the **full amount of** fees it collected." App. A at 12a (emphasis added). The emphasized words did not appear in *Knight*'s

(continued...)

see also Dean v. TWA, 924 F.2d 805, 809 (9th Cir. 1991) (under Railway Labor Act, nonmember is privileged to withhold dues demanded absent compliance with *Hudson*).

The panel's reversal of the District Court's damages award is a minority position. Two other circuits and a state supreme court denying full restitution have held that the minimally-appropriate damages remedy for collections absent *Hudson* compliance is the nonchargeable portion of the fee. *Lowary*, 903 F.2d at 432-33 (Sixth Circuit); *Weaver*, 970 F.2d at 1533-34 (same); *Wessel*, 299 F.3d at 1194-95 (Tenth Circuit); *Browne*, 169 Wis. 2d at 133 ("rights are sufficiently protected by requiring the unions to refund the excess amounts deducted, plus interest"). The panel's decision even conflicts with other Ninth Circuit panels in *Dean*, 924 F.2d at 809 (under RLA, without procedures in place, union "has no right . . . to collect fees for use in any union activity beyond collective bargaining"), *Prescott I*, 177 F.3d at 1109-10, and *Knight*, 131 F.3d at 815, as construed by *Prescott I*. For this reason, the Court should grant the Petition as to the important question presented on the appropriate monetary remedy for fees seized in violation of *Hudson*'s requirements.

IV. The Importance of the Issues Presented.

These questions manifestly are important, both in practice and principle, as this Court recognized by granting *certiorari* in cases such as *Ellis*, *Hudson*, *Beck*, *Lehnert*, *Miller*, and *Prescott*.

The questions are important in practice because their resolution will affect a large number of employees subject to

---

[9] (...continued)
holding, which reversed "the district court['s] . . . holding that . . . Patterson was not entitled to a full refund of all collected fees as a remedy for the defective *Hudson* notice." *Knight*, 131 F.3d at 815.

public-sector forced-unionism agreements. Such agreements are lawful in at least twenty (20) states and the District of Columbia. Milton L. Chappell, *Seeking a New Foundation: Legislative and Practical Alternatives to the Current Monopoly Bargaining Model That Will Enhance the Viability of Independent Teacher Groups*, 16 Gov't Union Rev. 1, 23-28 (table) (Summer 1995). As the cases above illustrate, public employee unions frequently assume the employer's liability in order to obtain and enforce forced-unionism agreements.[10] Their sole purpose is to ensure that public employers seize fees notwithstanding union defiance of *Hudson*'s requirements. Resolution of the first three questions will affect the administration of such agreements nationwide.

Whether public officials are immune from liability when they seize agency fees, and whether public employers and officials may be indemnified by labor unions from liability for seizing fees is important in principle, too. Requiring public employees to support financially their monopoly bargaining representative implicates fundamental constitutional rights. *Hudson*, 475 U.S. at 301 n.3; *see also Ellis*, 466 U.S. at 455. Questions as to how the government's responsibility, 475 U.S. at 307 n.20, is to be enforced against government complicity in the efforts of discrete, locally-powerful groups to violate the constitutional rights of another discrete, less-politically powerful group, *see Wilson v. Garcia*, 471 U.S. 261, 276 (1985), necessarily are important. Indeed, they are at the core of the congressional policy embodied in § 1983, which is to create a remedy "against those who representing a State in some capacity [a]re ***unable*** or ***unwilling*** to enforce a state law." *Monroe*, 365 U.S. at 175-76.

---

[10] California's statute authorizing forced unionism for local public employees requires indemnification where the forced-fee requirement is imposed without a CBA. Cal. Gov't Code § 3502.5(b).

This Court's intervention is necessary to establish conclusively nationwide that public officials who surrender government employees' unfettered right to choose whether to support their monopoly bargaining representative cannot avoid their "responsibility" under *Hudson*, 475 U.S. at 307 n.20. It is necessary to guarantee that public officials cannot, without economic consequence and in league with a labor union, "subject, or cause[] to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983.

Also of compelling importance is determination of whether unions defying *Hudson* may nevertheless retain agency fees illegally collected from employees. Aside from the sheer magnitude of the amount at issue—nearly $3 million awarded by the District Court, out of more than $14 million seized—resolution of that question is necessary to determine whether *Hudson*'s protections have any meaningful and continuing vitality in the face of union intransigence and artful evasions. *Cf.* Jeff Canfield, *What a Sham(e): The Broken Beck System in the Real World Workplace*, 47 Wayne L. Rev. 1049, 1050 (Fall 2001) (arguing *Beck* as construed by unions and the National Labor Relations Board "makes it nearly impossible for average employees to successfully assert those rights granted by [this] Court").

The Ninth Circuit's denial of meaningful monetary damages is an invitation for public-sector unions to roll the dice, disregard or attempt to evade *Hudson* (which happened in this case) and take their chances against the improbable happenstance that their victims will sue. The Ninth Circuit has drawn public-sector unions a virtual roadmap for artful evasion of *Hudson*, where "good faith" is defined as doing as little as possible in response to suit, and only after federal injunctive relief is entered. App. A at 4a, 15a; App. E at 41a. Indeed, unavoidably implicit in the lower

courts' view that full restitution is somehow "unfair" is the conclusion that unions doing **nothing** to comply with *Hudson*'s mandate are nevertheless entitled to the chargeable portion of agency fees.

This case is a uniquely appropriate vehicle for addressing the remedial issue. Here, CSEA failed to comply with *Hudson*'s requirement to provide "verification by an independent auditor," 475 U.S. at 307 n.18, but cannot complain of the "burden" or expense of doing so. *See*, *e.g.*, *Harik*, 298 F.3d at 869. Rather, privileged to seize more than $1 million monthly from 37,000 employees, CSEA nevertheless simply refused to spend $12,000 (about 30¢ per employee) to provide them with audited financial disclosure it already possessed. R. 32.

CONCLUSION

For the reasons stated above, this petition for writ of *certiorari* should be granted, and the case set for plenary briefing and argument on the important questions presented herein.

Respectfully submitted,

W. JAMES YOUNG*
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

ATTORNEY FOR PETITIONERS
*Counsel of Record

April 2003

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

9 January 2003

[316 F.3d 886]

Christine A. CUMMINGS; Janet Taylor Darvas; Richard K. Dehart; Christopher Garbani; Patricia A. McCumsey; Daniel Nowalis; and Claudia Stewart, Plaintiffs-Appellees/Cross-Appellants,

v.

Kathleen CONNELL, Controller, State of California; Marty Morgenstern, Director, California Department of Personnel Administration, Defendants/Cross-Appellees,

and

California State Employees Association, Local 1000, Service Employees International Union, AFL-CIO-CLC, Defendant-Appellant/Cross-Appellee.

Nos. 01-16735, 01-16819, 01-17445, 01-17450.

United States Court of Appeals, Ninth Circuit

Argued and Submitted Nov. 4, 2002.
Filed Jan. 9, 2003.

* * * *

[888]W. James Young, National Right to Work Legal Defense Foundation, Inc., Springfield, VA, for the plaintiffs-appellees/ cross-appellants.

Leslie R. Lopez, Deputy Attorney General, Office of the State Attorney General, Sacramento, CA, for defendant/ cross-appellee Kathleen Connell.

Warren C. Stracener, Assistant Chief Counsel, Department of Personnel Administration, State of California, Sacramento, CA, for defendant/cross-appellee Marty Morgenstern.

Eileen B. Goldsmith (argued) and Jeffrey B. Demain, Altshuler, Berzon, Nussbaum, Rubin & Demain, San Francisco, CA, for the defendant-appellant/cross-appellee.

Appeal from the United States District Court for the Eastern District of California; William B. Shubb, District Judge, Presiding. D.C. No. CV-99-02176-WBS.

[889]Before HAWKINS, GRABER, and TALLMAN, Circuit Judges.

OPINION

MICHAEL DALY HAWKINS, Circuit Judge.

It is settled law that a union may charge nonunion employees certain fees to pay for their "fair share" of the union's cost of negotiating and administering a collective bargaining agreement. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977). In *Chicago Teachers Union v. Hudson,* 475 U.S. 292, 310, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), the Supreme Court established certain safeguards in connection with the collection of such fees, including "an adequate explanation of the basis for the fee." This appeal involves the adequacy of the June 1999 "*Hudson* notice" prepared by the California State Employees Association (the "Union").

The Union is the exclusive representative for nine bargaining units of California state employees. After several years without collective bargaining agreements ("CBAs") in place, in March 1999, the Union entered into CBAs allowing

the state employer to deduct "fair share" fees from plaintiffs' paychecks and forward the funds to the Union. In April 1999, the Union sent a notice to nonmembers informing them of the "fair share" deductions. The state, through its controller (defendant Kathleen Connell), commenced making the deductions the same month. It is undisputed that the April notice was not intended to be a *Hudson* notice.

In June 1999, the Union sent a second notice that purported to comply with *Hudson*. The notice set the "fair share" fee (95% of union dues) and provided an opportunity for the nonunion employees (also called "fee payers") to object to paying for activities not germane to collective bargaining, automatically reducing the fee to 82% of union dues. This notice additionally explained how a fee payer could challenge the fee calculation by requesting arbitration. These procedures are not challenged here; rather, the dispute is over whether the notice included sufficient information for fee payers to decide to object and challenge the fee calculation.

The June 1999 notice included a report on the Union's 1998 expenditures and divided them into three categories: (1) those chargeable to fee payers, (2) those not chargeable to fee payers, and (3) those partially chargeable to fee payers. The report further broke down the expenditures into approximately 50 subcategories. The notice, however, did not contain a copy of the complete auditor's report, but instead informed fee payers that:

> The Report itemizes and describes the major categories of expenditures by the [Union]. The amounts attributed to these categories of expenditures are taken from an independent audit and supporting documentation of [the Union's] 1998 financial records contained in the Financial

> Statements prepared by Gibson and Company, Inc., a certified public accounting firm.

The notice also informed fee payers that a copy of the audit would be provided upon request.

Plaintiffs filed their complaint in November 1999, asserting that the April and June notices were constitutionally inadequate under *Hudson* because they failed to include a copy of the auditor's report. In December, the district court granted the plaintiffs' motion to certify a class action. In January 2000, the Union mailed a copy of the audit to all fee payers. This notice was still found to be deficient, however, because it did not extend the time for fee payers to object.

Still later in January 2000, the Union again tried to fulfill the plaintiffs' demands **[890]**and sent a new amended notice that cross-referenced both the June 1999 notice and the auditor's report and extended the period for nonmembers to challenge the fee calculation. Although the district court noted that the Union had made a good faith effort to correct defects in the earlier notices and that the court itself may have caused the Union to use the "piecemeal" approach of correcting the defects, the court ultimately concluded that these notices still did not comply with *Hudson* because too much time had elapsed for the cross-references to be sufficient.

Finally, in May 2000, the Union sent another "integrated" notice that included all the information from the previous notices, reopened the objection/challenge period, and accommodated an additional request by plaintiffs for an "allocation audit." It is undisputed that this notice complied with *Hudson*. The Union's calculation was then challenged through arbitration, and the arbitrator set the fee for objecting fee payers at 73% of dues for the period from April 1999 to

June 2000. Any fee payer who had objected to any of the notices from April 1999 to May 2000 then received a refund of the nonchargeable amount of the fee, with interest, retroactive to April 1999.

In May 2001, the district court ruled on cross-motions for summary judgment. Finding that all notices except the May 2000 notice were deficient under *Hudson,* the district court ordered the Union to refund the nonchargeable portion of the fee to all fee payers, including those who did not object to any of the notices. The court granted the Union's motion for summary judgment on the plaintiffs' challenge to two expenditures charged to fee payers. The court also rejected the plaintiffs' request for a permanent injunction and found they lacked standing to challenge an indemnification clause in the CBAs.

Plaintiffs sought more than $200,000 in attorneys' fees and costs. Because the plaintiffs were only partially successful in their litigation, the court reduced the number of hours for which they reasonably could recover. The court ultimately awarded only about $67,000 in fees, but awarded nearly full costs of $32,711.03. This appeal and cross-appeal followed.

I. The June 1999 Hudson Notice

A. *The Union's Appeal*

The Union appeals the district court's determination that its first *Hudson* notice was deficient because it failed to include a copy of the auditor's report. The Union contends that the concerns of *Hudson* were satisfied by its notice, which included a detailed breakdown of expenses by category, informed the nonmembers that the figures had been audited, and offered to provide a copy of the report upon request. We review de novo

the district court's grant of summary judgment on the sufficiency of the *Hudson* notice. *See Knight v. Kenai Peninsula Borough Sch. Dist.,* 131 F.3d 807, 812 (9th Cir.1997).

We find that the Union's 1999 notice did not satisfy the dictates of *Hudson*. Although it informed nonmembers that the figures in the notice were derived from an audited statement, it did not include any "independent verification" of this fact. *Hudson* did not say merely that the expenditures must be audited, but that "adequate disclosure surely would include ... *verification* by an independent auditor." 475 U.S. at 307 n. 18, 106 S.Ct. 1066 (emphasis added). Although not expressly addressing the question before us, we recently mirrored this requirement from *Hudson* and explained that, although a formal audit is not always required, "the union must provide a statement of its chargeable and nonchargeable expenses, together with an independent verification **[891]**that the expenses were actually incurred." *Harik v. Cal. Teachers Ass'n,* 298 F.3d 863, 866 (9th Cir. 2002).

The Union argues that this circuit previously suggested that *Hudson* requires the union only to communicate that the figures have been audited, relying on our decision in *Knight,* 131 F.3d at 812-13. In *Knight,* the union provided nonmember employees with an unaudited financial report that was generated from two audited reports. *Id.* at 813. With the help of appellate briefing, the court was able to determine that the unaudited figures were indeed based on two sets of audited figures, but found that the notice was insufficient because nonmembers "were not provided with sufficient direction to be able to determine that [the union's] expenditures were audited." *Id.*

We do not read *Knight* to say that *all* Hudson requires is an indication that reports have been audited, as the Union argues; rather, as the Union admits in its brief, the case is silent as to whether the notice must contain the auditor's report or some other type of verification. Read in context, we believe *Knight* to hold that *even if* that were all that *Hudson* required, the notice in that case was still insufficient because the fee payers could not even have determined that, at a minimum, the expenditures had been audited. *See id.* We therefore do not find our recent pronouncement in *Harik* regarding the need for inclusion of independent verification in the notice to be inconsistent with *Knight.*

Other circuits have required more than a simple statement that the figures provided have been audited. As the Tenth Circuit recently observed, the purpose of verification by an independent auditor is to give nonmembers assurance that the reviewed books really reflect the transactions that occurred and to give them information to make their own judgments about whether to object or to challenge the Union's calculations. *Wessel v. City of Albuquerque,* 299 F.3d 1186, 1193-94 (10th Cir. 2002). The court went on to hold that, "[w]ithout the auditor's reports, nonmembers could not have sufficient information to make such a determination. A simple statement that the Union's expenses were audited conveys minimal, if any, assistance to nonmembers attempting to decide whether to challenge the Union's determination." *Id.* at 1194. The Sixth Circuit also appears to require that the notice include some verification or certification by the independent auditor. *See, e.g., Damiano v. Matish,* 830 F.2d 1363, 1370 (6th Cir.1987) ("*Hudson* also mandates the verification of the union's calculations ... by means of an independent auditor. Moreover, the union must provide this information to each employee,

without formal request ...." (citations omitted)); *Tierney v. City of Toledo,* 824 F.2d 1497, 1504 (6th Cir.1987) ("[A]ll nonmembers must receive an adequate accounting, certified by an independent auditor and setting forth the major categories of the union's budgeted expenses....").

The Union's June 1999 notice essentially required the plaintiffs either to accept that the expenditures were indeed audited or to go to the trouble of requesting a copy of the audit report to verify the Union's summary. The purpose of the *Hudson* notice is to allow nonmembers to "gauge the propriety of the union's fee," 475 U.S. at 306, 106 S.Ct. 1066, and the Court clearly contemplated that such a determination would be based on information contained in that notice, *see id.* at 307 n. 18, 106 S.Ct. 1066. In light of the purposes of a *Hudson* notice, the language in *Hudson* itself, and the caselaw from this and other circuits, we agree with the district court that the representation in the June 1999 notice that the figures had been audited was not sufficient under *Hudson.*

[892]In so holding, however, we do not mean to suggest that a full copy of the audit must always be included in the notice. Indeed, as we recently held, a full-blown audit is not always required under *Hudson. Harik,* 298 F.3d at 869. In a case such as this one, in which the Union contends that the relevant figures were simply lifted from an audited financial statement, it should suffice for the notice to include a certification from the independent auditor that the summarized figures have indeed been audited and have been correctly reproduced from the audited report.[1]

---

[1] If a union must perform some additional calculations or adjustments in order to provide the requisite notice to nonmembers

(continued...)

B. *The Plaintiffs' Cross Appeal*

On cross-appeal, the plaintiffs contend that a *Hudson* notice should not only include some independent verification of expenditures, but that the notice must include an "allocation audit." In other words, the auditors should verify not only that money has been spent in the way the Union claims it has, but also that the Union has properly allocated its expenditures between chargeable and nonchargeable expenses.

Plaintiffs rely principally on a district court decision, *Mitchell v. Los Angeles Unified School Dist.,* 739 F.Supp. 511, 514-15 (C.D.Cal.1990), where the court said:

> [M]ere verification of total expenditures by category would be meaningless, inasmuch as it plays no role in the computation of the agency fee. The critical data is the ratio between chargeable vs. nonchargeable expenses, because it is this ratio that is used to compute the percentage of union dues properly assessed as an agency fee. Thus, the Court concludes that the independent verification requirement must apply to the allocation of chargeable and nonchargeable expenditures in a union's major expense categories.

Mitchell, however, was decided before a number of Ninth Circuit cases that discuss *Hudson* and its requirements. Although no opinion in this circuit has specifically addressed the issue of an allocation audit, language in a number of our decisions seems to foreclose plaintiffs' argument, thereby

---

[1] (...continued)
(such as adjusting a national union's breakdown of financial information to a local level, as in *Knight,* 131 F.3d at 813), then the certification may need to be more detailed and confirm that the local union has performed the mathematical adjustments correctly.

rejecting the requirements of *Mitchell*. For example, in the recent *Harik* case, we held that, "while a formal audit is not required, the union must provide a statement of its chargeable and nonchargeable expenses, together with an independent verification *that the expenses were actually incurred*." 298 F.3d at 866 (emphasis added). This passage certainly indicates that, although the Union must provide a breakdown between chargeable and nonchargeable expenses, the audit does not verify that the allocation is correct, but that the expenses were indeed spent the way the Union claims.

Further confirming this interpretation, *Harik* goes on to quote from an earlier decision in which we wrote that "[w]hat is required is a real independent verification of the financial data in question to make sure that expenditures are being made the way the union says they are." *Id.* at 869 (quoting *Prescott v. County of El Dorado ("Prescott I")*, 177 F.3d 1102, 1107 (9th Cir.1999)). Moreover, in *Prescott I*, we gave a concrete example of the role of independent verification, which further confirms that the auditor's role is more limited than plaintiffs urge: "[W]as an **[893]**amount supposedly directed to 'x' for negotiation expenses really dispersed to him, or did it go to 'y', who is union lobbyist?" 177 F.3d at 1107.

In addition, a number of other circuits have expressly rejected the notion that *Hudson* requires an allocation audit. In *Andrews v. Education Association of Cheshire*, 829 F.2d 335, 340 (2d Cir.1987), the Second Circuit held that *Hudson* does not require the auditor to verify the proper categorization of expenditures as chargeable or nonchargeable, but merely "to ensure that the expenditures which the union claims it made for certain expenses were actually made for those expenses." The court noted that a different interpretation "would have the auditor making a legal, not an accounting, decision regarding

the appropriateness of the allocation of expenses." *Id.; accord Gwirtz v. Ohio Educ. Ass'n,* 887 F.2d 678, 682 n. 3 (6th Cir.1989); *Ping v. Nat'l Educ. Ass'n,* 870 F.2d 1369, 1374 (7th Cir. 1989).

The Fourth Circuit also explained that it would make little sense for the auditor to undertake verifying the allocation when the union would have to justify its allocation when challenged by a fee payer regardless of the auditor's opinion:

> The appellants' plea [for an allocation audit] is tantamount to requiring the auditor to give a second legal opinion on whether categories were properly related to collective bargaining. This would require legal interpretations of several complex Supreme Court decisions by persons not professionally qualified to give them.... The Union's position is just as well reviewed by the employees. Moreover, if the employees object, the Union will be called upon to justify further its position.

Dashiell v. Montgomery County, 925 F.2d 750, 756 (4th Cir.1991).

As noted above, we believe the plaintiffs' claim has already been foreclosed by various decisions in this circuit. To the extent any doubt remains, we expressly join the Second, Fourth, Sixth and Seventh Circuits and reject plaintiffs' claim that *Hudson* requires an allocation audit.

II. Remedy

To remedy the inadequacies of the initial June 1999 notice, the district court ordered restitution of the nonchargeable portion of the fee to all class members, whether or not the nonmember employee had objected to any of the notices. The Union contends this remedy goes too far; the plaintiffs contend

it does not go far enough. We review de novo a district court's legal conclusion that a particular remedy is available. *EEOC v. Wal-Mart Stores, Inc.*, 156 F.3d 989, 992 (9th Cir.1998).

The plaintiffs' claim is easily disposed of, as it is contrary to clearly established law in this circuit. *See Prescott I,* 177 F.3d at 1109-10 (rejecting argument that the proper remedy should be a refund of *all* fees collected prior to compliance with *Hudson*). In an attempt to evade the holding of *Prescott I,* the plaintiffs argue that *Prescott I* is inconsistent with this circuit's earlier decision in *Knight,* in which the court noted that the union had not complied with *Hudson* and "was not entitled to the fees that it collected." 131 F.3d at 815. Plaintiffs suggest we should simply ignore *Prescott I* and apply *Knight.* However, it is not the practice of this circuit to simply ignore an inconsistency, but rather to take the case en banc to resolve a conflict. *See* Fed. R.App. P. 35(a)(1).

More to the point here, however, the cases are consistent. *Prescott I* expressly addressed the quoted phrase in *Knight* and explained that, although *Knight* said the union was not entitled to the full amount of fees it collected, *Knight* did *not* say the union could not receive any fees **[894]**whatsoever. 177 F.3d at 1109. In support of its interpretation of *Knight*, *Prescott I* also pointed out that, instead of simply ordering complete restitution, the court in *Knight* remanded, leaving " 'the measure of damages ... for the district court to determine in the first instance.' " *Id.* (quoting *Knight,* 131 F.3d at 815). The district court thus properly applied *Prescott I* and rejected the plaintiffs' claim for full restitution.

We agree with the Union, however, that the district court went too far in ordering partial restitution to all class members. Ordinarily, if there is a proper *Hudson* notice, the employee has

the burden to object to paying the full nonmember fee, and only then is entitled to a refund of the nonchargeable portion of the fee. *See Hudson,* 475 U.S. at 306 n. 16, 106 S.Ct. 1066 ("The nonmember's 'burden' is simply the obligation to make his objection known."); *Abood,* 431 U.S. at 238, 97 S.Ct. 1782 ("'dissent is not to be presumed'") (quoting *Int'l Ass'n of Machinists v. Street,* 367 U.S. 740, 774, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961)); *see also Mitchell v. L.A. Unified Sch. Dist.,* 963 F.2d 258, 262-63 (9th Cir.1992) (rejecting argument that because only nonmembers were involved in suit, they should be presumed to object to paying full fair share fee).

In this case, it is undisputed that the Union's May 2000 notice complied with *Hudson.* If a nonmember objected to *any* of the notices between April 1999 and May 2000, the Union refunded the nonchargeable portion of the fee, with interest, retroactive to the first paycheck deduction. Accordingly, the Union argues that it was improper for the district court to order it to refund the nonchargeable portion to all class members, including those who did not affirmatively object to even the proper *Hudson* notice in May 2000.

Plaintiffs contend that the Union cannot "unring the bell" by providing a correct notice thirteen months after it began deducting fees and that a refund of the nonchargeable portion is the minimum permitted by our caselaw. *See Knight,* 131 F.3d at 815; *Prescott I,* 177 F.3d at 1109. However, in neither *Knight* nor *Prescott I* did the union ever issue a corrected *Hudson* notice with a new opportunity for nonmembers to object, and thus they are inapposite to this situation.

We do, however, find it helpful to consider cases involving private-sector unions that must issue notices similar to those required by *Hudson* pursuant to *Communications Workers of*

America v. Beck, 487 U.S. 735, 108 S.Ct. 2641, 101 L.Ed.2d 634 (1988). If a *Beck* notice is defective, the union must send a corrected notice, and issue retroactive refunds, with interest, to fee payers *who object to the corrected notice. Rochester Mfg. Co.,* 323 N.L.R.B. 260, 262, 1997 WL 113885 (1997), *aff'd mem. Cecil v. NLRB,* 194 F.3d 1311 (6th Cir.1999), *cert. denied,* 529 U.S. 1066, 120 S.Ct. 1671, 146 L.Ed.2d 481 (2000); *see also United Food & Commercial Workers Union, Local 1036 v. NLRB,* 249 F.3d 1115, 1120 (9th Cir.2001), *reinstated in pertinent part,* 307 F.3d 760, 774 n. 21 (9th Cir.2002) (en banc) (remedy for improper "welcoming letter" was to send corrected letter to those who received defective notice; refunds should be made only to those who receive corrected notice and object).[2]

[895]In this case, the district court found that the plaintiffs had no burden to object because the deductions were made "in the absence of a reasonably prompt notice that satisfied the requirements of *Hudson.*" It is true that a good deal of time elapsed between the initial paycheck deduction and the proper *Hudson* notice. But this does not mean the Union was intentionally dragging its feet. It issued a notice in June 1999 that it believed complied with *Hudson.* Plaintiffs filed suit in

---

[2] Although not directly on point, caselaw in other circuits is also generally in harmony with this view. In a recent Tenth Circuit case, the union issued a corrected notice and refunded the nongermane fees to the plaintiffs (who had apparently all objected to the initial notice). *Wessel,* 299 F.3d at 1193, 1194. The court noted that the district court correctly awarded nominal damages to the plaintiffs for the initial incorrect notice and that plaintiffs were entitled to no further relief. *Id.* at 1194; *see also Weaver v. Univ. of Cincinnati,* 970 F.2d 1523, 1532 (6th Cir.1992) (noting that until proper *Hudson* notice is issued, employee will be allowed subsequent opportunities to object).

November, contesting the adequacy of that notice. The Union issued two more notices in January 2000 in an attempt to comply with *Hudson,* even though the district court eventually found these lacking as well. The district court's order even acknowledges that the Union had made good faith attempts to correct the notice and that the district court itself may have created the "piecemeal" approach to the notices.

The purpose of the *Hudson* notice is to provide fee payers with adequate information so that they may decide whether to object or to challenge the Union's calculation. *See Hudson,* 475 U.S. at 306, 106 S.Ct. 1066. In this case, the nonmembers all eventually received notices with sufficient information under *Hudson,* and a renewed opportunity to object and receive their money back with interest. We fail to see how plaintiffs suffered any compensable harm (aside from nominal damages) from the initial defective notice. On these facts, we hold that the May 2000 notice was adequate to renew the burden on the plaintiffs to object, and ordering a refund to nonobjecting plaintiffs was therefore overbroad. We stress, however, that ordinarily a lapse of thirteen months before issuing an adequate *Hudson* notice would be unacceptable, but in this case we place great significance on the district court's finding that the Union was acting in good faith and on its concession that the court itself may have caused the delay in the Union's issuing the ultimately acceptable notice.

III. Class Certification

We review a district court's decision to grant or deny class certification for abuse of discretion. *Zinser v. Accufix Research Inst., Inc.,* 253 F.3d 1180, 1186 (9th Cir.), *amended* 273 F.3d 1266 (9th Cir.2001). The Union contends that the district court abused its discretion by certifying the class because the

plaintiffs are not adequate class representatives. Specifically, the Union argues that the named plaintiffs' interests are antagonistic to those of the class because the plaintiffs seek full restitution of *all* fees paid, a remedy that is "punitive insofar as it [seeks] to deprive the union of fees to which it was, doubtlessly, entitled." *Prescott I,* 177 F.3d at 1109.

The Seventh Circuit found that pursuit of such a remedy created a "potentially serious conflict of interest within the class," justifying a refusal to certify a class. *Gilpin v. Am. Fed. of State, County, and Municipal Employees,* 875 F.2d 1310, 1313 (7th Cir.1989). The court explained:

> Two distinct types of employee will decline to join the union representing their bargaining unit. The first is the employee who is hostile to unions on political or ideological grounds. The second is the employee who is happy to be represented by a union but won't pay any more for that representation than he is forced to. The two types have potentially divergent aims. The first wants to weaken and if possible destroy **[896]**the union; the second, a free rider, wants merely to shift as much of the cost of representation as possible to other workers, i.e., union members. The "restitution" remedy ... is consistent with--and only with--the aims of the first type of employee.... Not only would the "restitution" ... confer a windfall on the nonunion employees but it might embarrass the union financially. Yet those nonunion employees who, while not wanting to pay more (and perhaps even wanting to pay less) than their "fair share" fees, have no desire to ruin the union or impair its ability to represent them effectively might not want so punitive a remedy.

Id. The Fourth and Sixth Circuits have also upheld a denial of class certification on similar grounds. *Weaver v. Univ. of Cincinnati,* 970 F.2d 1523, 1530-31 (6th Cir.1992); *Kidwell v. Transp. Communications Int'l Union,* 946 F.2d 283, 305-06 (4th Cir.1991).

The district court recognized that this case presents concerns similar to the ones addressed in *Gilpin.* However, the court also noted that the full restitution remedy was clearly unavailable under this circuit's precedent and that the other remedies sought did not create a conflict between class members. The court also pointed out that the Union presented no evidence that an actual conflict existed among class members. The court thus determined that the conflict was too speculative at the time to prevent finding the named plaintiffs to be adequate representatives. The court, however, remained willing to reconsider and decertify the class if the plaintiffs continued to pursue the remedy or there was evidence of an actual conflict.

We believe that the district court's approach was entirely appropriate. As discussed above, the district court was correct that the "punitive" remedy of full restitution is precluded in this circuit by existing caselaw. *Prescott I,* 177 F.3d at 1109-10. Therefore, the potential conflict discussed in *Gilpin* is not truly present in this case. Although the plaintiffs may seek to change the current rule through the en banc process or by petitioning the Supreme Court, the district court correctly remained willing to reconsider and decertify the class if a conflict should develop. Class certification is not immutable, and class representative status could be withdrawn or modified if at any time the representatives could no longer protect the interests of the class. *Soc. Servs. Union, Local 535 v. County of Santa Clara,* 609 F.2d 944, 948-49 (9th Cir.1979).

Furthermore, this circuit does not favor denial of class certification on the basis of speculative conflicts. *See id.* at 948 ("Mere speculation as to conflicts that may develop at the remedy stage is insufficient to support denial of initial class certification."); *see also Blackie v. Barrack,* 524 F.2d 891, 909 (9th Cir.1975) (noting that class members might have differing interests at later stages of litigation, but that "potential conflicts" do not present a valid reason for refusing to certify a class). The Union produced no evidence that class members actually possess opposing views regarding the pursuit of the punitive remedy. Without some evidence of an actual conflict, the district court did not abuse its discretion by granting class certification.

IV. Judgment Against Connell and Morgenstern

Plaintiffs contend that the district court erred by refusing to enter judgment against defendants Kathleen Connell, the State Controller of California, and Marty Morgenstern, Director of the Department of Personnel Administration. This argument is also foreclosed by our caselaw. In *Foster v. Mahdesian,* 268 F.3d 689, 694 (9th Cir.2001), *cert. denied, Foster v. Garcy,* --- U.S. ----, 122 S.Ct. 2327, 153 [897]L.Ed.2d 159 (2002), we held that a public sector employer who deducts "fair share" fees from an employee's paycheck is not liable if the union fails to provide adequate notice under *Hudson.* We stated that "the routine collection of agency fees does not trigger a duty ... to ensure that every employee has received a proper *Hudson* notice." *Id.* at 693. Such a duty arises only if the employer takes "adverse action" against the fee payer. *See Knight,* 131 F.3d at 817. "Adverse action" must be more serious than the routine collection of fees. *Foster,* 268 F.3d at 693.

Plaintiffs offer no explanation why Morgenstern should be liable for the defective *Hudson* notices. Instead, they again

suggest that *Foster* should not be followed because it conflicts with language in *Knight* regarding when an employer has an obligation for the sufficiency of a *Hudson* notice. *Knight,* 131 F.3d at 817 (holding that a school district cannot take "adverse action" against a nonmember employee without ensuring adequate *Hudson* notice was given). *Foster,* however, contains a detailed discussion of the *Knight* decision. 268 F.3d at 693-94. Rather than conflicting with *Knight*, *Foster* interprets and clarifies *Knight* and the meaning of the term "adverse action" within that decision. *See id.*

With respect to defendant Connell, the plaintiffs attempt to distinguish *Foster* because Connell is also responsible for mailing the *Hudson* notices. This fact is not significant. The State Controller is responsible for mailing the *Hudson* notices because of the large number of employees who have requested that their home addresses not be disclosed outside of state government. The act of mailing notices is only a ministerial function; there is no suggestion the Controller has any responsibility for the content of such notices. Moreover, it would be strange to say that the mere act of mailing notices is "adverse action" against an employee, when the act of taking money from their check is not. *See id.* The district court properly declined to enter judgment against Connell and Morgenstern.

V. Permanent Injunction

The district court's denial of a permanent injunction is reviewed for abuse of discretion. *Tollis, Inc. v. San Bernardino County,* 827 F.2d 1329, 1331 (9th Cir.1987). Plaintiffs contend that the district court abused its discretion by failing to grant a permanent injunction "barring all fee seizures from the nonmembers in the absence of adequate notice and procedures."

In seeking a permanent injunction, the moving party must convince the court that relief is needed: "The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *United States v. W.T. Grant Co.,* 345 U.S. 629, 633, 73 S.Ct. 894, 97 L.Ed. 1303 (1953). In this case, the district court did not believe that a permanent injunction was warranted, noting that the Union mailed a proper notice in May 2000 for the 1999 fee payer year and then mailed another proper notice in June 2000 for the 2000 fee payer year. Thus, the court found "a constitutional agency-fee collection procedure is established and operating, and injunctive relief is no longer warranted." In addition, the Union's controller, Patrick Haagensen, declared under penalty of perjury that the Union would use the same *Hudson* notice format in the future.[3]

[898]In a recent decision involving similar facts, we held that a district court had properly refused to grant declaratory and injunctive relief where a union had mailed an inadequate notice in October 1998, but then mailed a proper notice in December. *Carlson v. United Academics,* 265 F.3d 778, 786 (9th Cir.2001), *cert. denied,* 535 U.S. 970, 122 S.Ct. 1437, 152 L.Ed.2d 381 (2002). We noted that "[i]t is unreasonable to think that the Union would resort to conduct that it had admitted in writing was constitutionally deficient and had attempted to correct.... We do not believe United Academics would now attempt to revert to the deficient notice format and subject itself to future litigation that it would clearly lose." *Id.* at 786-87; *see also Wessel,* 299 F.3d at 1194 (holding that there

---

[3] We note that the inclusion of an allocation audit is no longer required in light of our holding in Section I, above.

is no need for permanent injunction where union issued corrected fair share notice and committed itself to include required information in future notices).

The requirements of *Hudson* in this circuit have been clarified by this litigation. As in *Carlson,* it would be foolish for the Union to now revert to a deficient format and subject itself to additional lawsuits. The district court did not abuse its discretion by refusing to grant a permanent injunction.

VI. Standing to Challenge Indemnification Clause

Plaintiffs also challenge the district court's determination that they lacked standing to challenge indemnification clauses in the CBAs regarding liability for seizure of compulsory dues. This issue was initially decided in *Prescott I,* 177 F.3d at 1112 (finding plaintiffs lacked standing). *Prescott I* was then vacated and remanded by the Supreme Court for reconsideration in light of *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.,* 528 U.S. 167, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). The panel in turn remanded the case to the district court for reconsideration of the standing issue. *Prescott v. County of El Dorado ("Prescott II"),* 204 F.3d 984, 984-85 (9th Cir.2000).

On remand, the district court again found that the plaintiffs lacked standing to challenge the indemnification clause. On appeal, we recently affirmed once more, again finding that the plaintiffs lacked standing. *Prescott v. County of El Dorado ("Prescott III"),* 298 F.3d 844, 846 (9th Cir.2002). Plaintiffs concede that *Prescott III* controls their claim as well, and we therefore affirm the district court's determination that the plaintiffs lack standing to challenge the indemnification clauses.

VII. Attorneys' Fees and Costs

On remand, the district court should reconsider the issue of attorneys' fees and costs to determine whether further reduction is appropriate in light of our decision regarding the proper remedy for the *Hudson* violation. We do, however, believe it may be helpful to speak to the issue of the initial cost award, as the Union contends that the district court abused its discretion by awarding plaintiffs nearly all their costs despite substantially reducing the fee award to reflect limited success on the merits.[4]

From our reading of the district court's order, it appears that the court recognized that it had the discretion to reduce the cost award as well, but declined to do so because the costs incurred were sufficiently related to the successful claims to justify the full award. Because the Union seems to think the court did not **[899]**recognize its ability to reduce the cost award, we wish to clarify that the district court *may* reduce costs to reflect limited success on the merits, *see, e.g., Bryant v. City of Chicago,* 200 F.3d 1092, 1102 (7th Cir.), *cert. denied,* 531 U.S. 821, 121 S.Ct. 64, 148 L.Ed.2d 30 (2000); *Case v. Unified Sch. Dist. No. 233,* 157 F.3d 1243, 1258 (10th Cir.1998), but that it is not required to do so if such costs are sufficiently related to the plaintiffs' successful *Hudson* claim.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED. Each party to bear its own costs on appeal.

---

[4] Plaintiffs had contended that the Union had miscalculated the fee by charging fee payers for two nonchargeable expenditures, but were unsuccessful on these claims. Plaintiffs did not appeal from the grant of summary judgment to defendants on these claims.

APPENDIX B

FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

31 July 2001

[Clerk's stamp omitted in printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

AMENDED
JUDGMENT IN A CIVIL CASE

CHRISTINE A. CUMMINGS, et al.,

v. CASE NUMBER: CIV S-CIV S-99-2176 WBS DAD

KATHLEEN CONNELL, Controller, State of California, et al.,

XX -- **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF JULY 31, 2001.

Jack L. Wagner,
Clerk of the Court

ENTERED: July 31, 2001

by: /s/
P. Castro, Deputy Clerk

APPENDIX C

MEMORANDUM AND ORDER RE MOTION TO RECONSIDER OR AMEND JUDGMENT IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

31 July 2001

[Clerk's stamp omitted in printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CHRISTINE A. CUMMINGS, et al.,

NO. CIV. S-99-2176 WBS DAD

Plaintiffs,

v.

MEMORANDUM AND ORDER RE MOTION TO RECONSIDER OR AMEND JUDGMENT

KATHLEEN CONNELL, Controller, State of California, et al.,

Defendants.

Defendant California State Employees Association, Local 1000 ("CSEA") seeks relief from the judgment entered on this court's order of May 2, 2001 granting plaintiffs' motion for summary judgment in part and awarding partial restitution of withdrawn fees, pursuant to Federal Rule of Civil Procedure 60(b), or in the alternative, alteration or amendment of the judgment pursuant to Rule 59(e).

In its May 2, 2001 order, the court awarded restitution of the non-chargeable portion of the withdrawn fees to all nonmembers, including those who did not object pursuant to the [2]May 2000 notice. CSEA's present motion is based on the ground that an "intervening" Ninth Circuit decision, decided after this court's decision filed May 2, "makes clear that the remedy should only run to those fee payers who filed

objections in response to CSEA's May 2000 Notice." (Def. CSEA's Notice of Motion and Motion for Relief from Judgment, filed June 11, 2001, at 2:6-8).

In the alternative, CSEA moves to alter or amend the judgment, on the ground that CSEA should not be required to refund fees collected after the nonmembers received the May notice, which plaintiffs agree was adequate under Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986). CSEA also argues that the award does not account for CSEA's mid-year fee adjustment, which reduced the non-chargeable portion of the fee.

Discussion

A. Motion for Relief from Judgment

Preliminarily, plaintiffs urge this court not to consider the merits of CSEA's arguments on this motion, citing Ninth Circuit authority for the proposition that an alleged change in judicial review of applicable law after final judgment is not a sufficient basis for vacating such judgment entered before announcement of the change. See Title v. United States, 263 F.2d 28, 31 (9th Cir. 1959); see also Perrin v. Aluminum Co. of America, 197 F.2d 254, 255 (9th Cir. 1952) ("Rule 60(b) was not intended to be resorted to as an alternative to review by appeal[.]".

CSEA , on the other hand, argues that both its Rule 59(e) and 60(b) motions are timely, citing Local Rule 78-230(k). See also School Dist. No. 1J, Multnomah County, Or. v. AC and S, [3]Inc., 5-F.3d 1255, 1262-63 (9th Cir. 1993); United States v. Westlands Water Dist., 134 F. Supp. 2d 1111, 1130 (E.D. Cal. 2001). Both sides agree that an appeal will be taken from this court's judgment, regardless of how the court rules on the

pending motion, and that the Court of Appeals will ultimately have to deal with any cases decided after this court's judgment became final. Therefore, in order to provide the appellate court with the a complete record, the court resolves this threshold conflict in favor of addressing CSEA's arguments on their merits.

CSEA argues that the Ninth Circuit's recent decision in United Food and Commercial Workers Union, Local 1036 v. National Labor Relations Bd., 249 F.3d 1115 (9th Cir. 2001), requires that this court grant CSEA relief from the court's order awarding a partial refund to nonmembers who did not object pursuant to the May notice.[1] In Local 1036, the Ninth Circuit considered whether the union violated a provision of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(b)(1)(A), "by informing new employees [in a 'welcome letter'] that they were required as a condition of employment to become full members of [the local union]." Id. at 1117. The National Labor Relations Board (the "Board") found that the welcome letter violated the NLRA, and ordered the union to notify all bargaining unit members of their rights, and reimburse those employees who now object to being full union members. Id. at 1118.

The Ninth Circuit affirmed the Board's finding of a [4]violation, but concluded that "the remedial order goes too far." Id. at 1120. In reaching its conclusion, the Ninth Circuit emphasized that "[t]he offending letter was not sent to all employees." Id. The Ninth Circuit then stated: "Reimbursement is due only those employees who received the [offending] letter and object." Id.

---

[1] Because all objectors have already received the refund mandated by the court's order, CSEA argues that the order should be vacated.

This language does not compel this court to change its order in the present case. The union's collection of fees in Local 1036 was not subject to constitutional scrutiny because union security clauses negotiated between a union and a private employer under the NLRA "do not involve state action implicating constitutional considerations." See California Saw and Knife Works, 320 N.L.R.B. 224, 228 (1995), cert. denied, Strang v. N.L.R.B., 525 U.S. 813 (1998). Thus, the union was not required to satisfy the minimal procedure requirements set forth in Hudson, or the collection standards expressed in Grunwald v. San Bernardino City Unified School District, 994 F.2d 1370 (9th Cir. 1993). See Hudson, 475 U.S. at 304-309 ("The Union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." (quoting Abood v. Detroit Bd. of Educ., 431 U.S. 209, 244 (1977)); Grunwald, 994 F.2d at 1373 (requiring an adequate explanation for the use of a deduction-escrow-refund procedure, and a reasonably prompt refund).

In finding the remedy over-broad, the Ninth Circuit noted only that the offending letter was not sent to all **[5]**employees. In order to accept CSEA's interpretation of Local 1036 the court would have to infer that the Ninth Circuit would have also found the remedy over-broad if the Board did not include an objection requirement. Such an inference would be based on pure speculation and does not warrant relief from the judgment in this case.

CSEA further argues that Local 1036 re-affirms the rule that a nonmember's "dissent is not to be presumed." See Abood, 431 U.S. at 238 (quoting International Ass'n of Machinists v. Street, 367 U.S. 776, 774 (1961)). According to

CSEA, this court's remedy is inconsistent with that rule because the refund "depends on an implicit finding that [non-objectors] would have objected to CSEA's original Hudson notice if only that notice had complied with Hudson." (Def.'s Mot. at 10:5-8). CSEA argues that such a presumption contradicts established precedent that "a union is permitted to charge the equivalent of full union dues, including the so-called 'non-chargeable' amount, to all non-members who do not object." (Def.'s Mot. at 10:2-4) (emphasis omitted).

This statement of the law is incomplete, and neglects to take into account the collection method employed by CSEA in this case. As this court noted in its May 2 order, a union is only permitted to collect full union dues when such collection complies with the minimal procedural requirements necessary to protect nonmembers' First Amendment rights. See Hudson, 475 U.S. at 304-309; Grunwald, 994 F.2d at 1373. Although the Supreme Court has acknowledged readily available alternatives, such as an advance reduction of dues paid by nonmembers, CSEA utilized a **[6]**"more cumbersome and intrusive" deduction-refund procedure by collecting fees from nonmembers for non-germane expenditures before they received adequate notice and an opportunity to object.[2] Grunwald, at 1375 (discussing the "deduction-*escrow*-refund" method); see Hudson, at 304 (quoting Ellis v. Railway Clerks, 466 U.S. 435, 444 (1984)); see also Grunwald, at 1377 ("Ideally . . . the union would collect from nonmembers only that amount used

---

[2] CSEA's fee calculation for nonmembers discounted only those expenditures relating to member-only benefits, such as group insurance plans and entertainment discounts. The court discerns from the record that CSEA collected union fees from nonmembers without the use of an escrow procedure for eight months until this court enjoined the seizures in December of 1999.

for representational purposes."). In such circumstances, the Ninth Circuit has emphasized the importance of an escrow procedure, as well as a prompt notice and refund to minimize the impingement on nonmembers' First Amendment interests. See Grunwald, at 1374-76 (emphasizing that the use of escrow enures that money collected from nonmembers would "not be used, even temporarily, for ideological purposes"); Knight, 131 F.3d at 812 ("as soon as practicable, the union must send out proper notices").

In its May 2 order, this court pointed out that "[t]his case is materially different from Grunwald." ("Memorandum and Order, filed May 2, 2001, at 12:1); Grunwald, 994 F.2d at 1375-77 (holding that the deduction-escrow-refund procedure employed in that case adequately protected the plaintiffs' First Amendment rights). Here, plaintiffs did not receive adequate notice until May 2000, thirteen months after deductions began in the absence [7]of an escrow procedure. Thus, under Grunwald, the May notice does not constitute a reasonable accommodation of plaintiffs' First Amendment right to a "fair, prompt and effective procedure." Grunwald, at 1373. Accordingly, CSEA is not entitled to retain the full union dues it collected.

The court's measure of relief is appropriate because it allows the union to retain the chargeable portion of the fees, to which it was, "doubtlessly, entitled" as plaintiffs' collective-bargaining representative. Prescott v. County of El Dorado, 177 F.3d 1102, 1109 (9th Cir. 1999) (citing Gilpin v. American Fed. of State, County, and Mun. Employees, 875 F.2d 1310, 1315 (7th Cir. 1989)). Because CSEA has not demonstrated circumstances warranting relief from judgment under Rule 60(b)(6), the court must deny the motion.

B. Motion to Alter or Amend Judgment

The court may alter or amend a judgment under Rule 59(e) to correct clerical errors. See Fed.R.Civ.P. 59(e). This court awarded a partial refund based on the non-chargeable portion of fees collected during the 1999 fee-payer year, which includes the months from April 1999 through June 1999. CSEA notes that two fee payments were collected after plaintiffs received the May notice, which was adequate under Hudson.[3] It is not consistent with the court's intention to include fees collected at the end of May and June in the partial refund, and the court will amend the judgment accordingly.

In the May 2 order, the court determined that the non-[8]chargeable and thus, refundable portion of the collected fees was twenty percent of regular membership dues at the nonmember's salary level for the 1999 fee-payer year. (See Defs.' Ex. C, Attached to Harrigan Decl. in Support of CSEA's First Motion for Summary Judgment, filed July 6, 2000). This figure is correct for fees collected from April 1999 through December 1999.

However, in January 2000, CSEA adjusted its calculations by reducing the total fees collected from each nonmember.[4] The court's twenty-percent figure does not reflect this adjustment. Based on CSEA's calculations, the non-chargeable portion of the fees collected from January 2000 through April

---

[3] The May notice was mailed on May 17, and the payments were collected at the end of May and June.

[4] CSEA reduced the nonmember's share of both chargeable and non-chargeable fees from ninety-three percent of full union dues, to eighty-eight and one-half percent. CSEA's calculation of the chargeable portion did not change, remaining at seventy-three percent.

2000 was fifteen and one-half percent, not twenty percent.[5] This calculation is consistent with the court's intention to refund only the non-chargeable portion of collected fees, and the court will amend the judgment accordingly.

IT IS THEREFORE ORDERED that defendant CSEA's motion for relief from judgment be, and the same hereby is, DENIED.

IT IS FURTHER ORDERED that defendant CSEA's motion to alter or amend the judgment be, and the same hereby is, GRANTED. The court's order filed May 2, 2001, is amended at page 25, lines 3-7, as follows: Defendant CSEA shall return to all plaintiffs who paid any "fair share" fees from April 1999 through April [9]2000, and who have not yet received an equivalent refund, twenty percent of regular membership dues at the fee-payer's salary level from April 1999 through December 1999, and fifteen and one-half percent of regular membership dues at the fee-payer's salary level from January 2000 through April 2000, with interest.

IT IS SO ORDERED.

DATED: July 30, 2001

/s/
WILLIAM B. SHUBB
UNITED STATES DISTRICT COURT JUDGE

---

[5] Fifteen and one-half percent represents the difference between seventy-three percent (chargeable portion) and eighty-eight and one-half percent of full union dues (total fee for non-members).

APPENDIX D

FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

2 May 2001

[Clerk's stamp omitted in printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

CHRISTINE A. CUMMINGS, et al.

v. CASE NUMBER: CIV S-99-2176 WBS DAD

KATHLEEN CONNELL, Controller, State of California, et al.

XX -- **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF MAY 2, 2001.

Jack L. Wagner,
Clerk of the Court

ENTERED: May 2, 2001

by: /s/
P. Castro, Deputy Clerk

APPENDIX E

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

2 May 2001

[Clerk's stamp omitted in printing]
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CHRISTINE A. CUMMINGS, et al.,

NO. CIV. S-99-2176 WBS DAD

Plaintiffs,

v. MEMORANDUM AND ORDER

KATHLEEN CONNELL, Controller,
State of California, et al.,

Defendants.

Named plaintiffs represent a class of state employees organized in bargaining units represented by defendant California State Employees Association, Local 1000 ("CSEA" or "the union"). Plaintiffs, who are not union members, allege that CSEA has been improperly withholding a portion of union dues from their paychecks without providing them with the procedural safeguards mandated by Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986). In addition, plaintiffs claim that the indemnification provision contained in the collective bargaining agreement between the union and the State of California is void as against public policy. Both plaintiffs and defendants move for summary judgment pursuant to Federal Rule of Civil Procedure 56.

[2]I. Procedural and Factual Background

CSEA is the exclusive representative for collective bargaining purposes of all employees in bargaining units 1, 3, 4, 11, 14, 15, 17, 20, and 21. In March 1999, defendants Morgenstern and CSEA entered into collective bargaining agreements allowing the state employer to deduct and forward "fair share" fees from plaintiffs' ("fee payers" or "nonmembers") paychecks to CSEA. The "fair share" purportedly represents the nonmember's share of the cost of collective bargaining. In April and June 1999, CSEA sent two notices to nonmembers regarding the "fair share" deductions ("April notice" and "June notice"). The June notice included the "1998 Expenditure Report," which was based on an independent audit (the "Audit") of CSEA's 1998 financial records prepared by the Gibson and Company, Inc., a certified public accounting firm.

Plaintiffs filed their complaint and moved for a preliminary injunction in November 1999, claiming that the April and June notices were constitutionally inadequate under Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986), because defendants did not provide an actual copy of the Audit with the notices. On December 20, 1999, this court certified the class and partially granted plaintiffs' motion.[1] Specifically, this court ordered [3]that upon the posting of a security bond, "defendants . . . shall be enjoined from seizing agency fees from

---

[1] The court certified the following class: All former, current, and future State of California employees employed in Bargaining Units 1, 3, 4, 11, 14, 15, 17, 20, and 21 who are, have been, or will be represented exclusively for purposes of collective bargaining by CSEA, but who are not, were not, or will not be members of CSEA, and were (after 2 March 1999), are, and/or will be nevertheless required to pay agency fees to CSEA as a condition of continued State employment. (Memorandum and Order filed Dec. 20, 1999, at 23:23-27).

plaintiffs or any member of the represented class until defendants have provided such plaintiff or member of the class with a copy of the auditor's report and the appropriate documentation." (Memorandum and Order filed Dec. 20, 1999, at 24:8-16).[2]

In January 2000, defendants mailed a copy of the Audit to plaintiffs. On January 19, 2000, plaintiffs moved for a temporary restraining order ("TRO"), claiming, among other things, that defendants did not change the deadline for plaintiffs to object to the notice after sending them the Audit. The court denied the motion for TRO in open court "on the condition that . . . defendants shall provide to the class members an adequate notice again making reference to the audits that are now being distributed, and allowing the plaintiffs and the members of the class an opportunity to challenge the audits pursuant to the discussion in Chicago Teachers Union v. Hudson." (Transcript of Jan. 19, 2000 TRO hearing, at 28:13-20).

On January 25, 2000, the Controller's Office mailed the "January 2000 Amended Notice" (the "amended notice") to the fee payers. Among other things, the amended notice referenced the Audit and extended the period for nonunion members to challenge the fee calculation until March 1, 2000. The court heard [4]plaintiffs' January 19 motion as a preliminary injunction on February 23, 2000, and denied the motion.

---

[2] Agency fees are synonymous with "fair share" fees, which represent a nonmember's pro rata share of expenses incurred by the union in negotiating collective bargaining agreements. See Leer v. Washington Educ. Ass'n, 172 F.R.D. 439, 443 (W.D. Wash. 1997).

In May, CSEA mailed the "May 2000 Notice To Fee Payers" ("May notice"). This notice included an "allocation audit," which verifies a union's allocation of chargeable and non-chargeable expenses, and integrated the prior notices and the "1998 Expenditure Report." Plaintiffs agreed during oral argument that the May notice met the requirements of Hudson. The May notice allowed fee payers to retroactively object to all prior deductions, beginning with the first deduction in April 1999. According to defendants, by the end of March 2001, all objectors will have received a refund of the entire non-chargeable portion of the 1999 "fair share" fee, with interest.

Plaintiffs move for summary judgment on the adequacy of the April, June and January notices, as well as the validity of the indemnification provision contained in the collective bargaining agreements between the State of California and CSEA. Defendants move for summary judgment on the grounds that (1) the June and January notices are adequate as a matter of law; (2) plaintiffs have not suffered any compensable harm; (3) if plaintiffs have suffered compensable harm, their challenges to CSEA's expenditures have no merit; (4) plaintiffs do not have standing to challenge the indemnification provision; and (5) the indemnification provision is valid as a matter of law.[3]

[5]II. Discussion

The court must grant summary judgment to a moving party "if the pleadings, depositions, answers to interrogatories,

---

[3] In addition, defendants Connell and Morgenstern move for summary judgment on the ground that the State employer has no duty to review "Hudson" notices prepared by CSEA. The court does not reach the merits of this issue because the court's award of partial restitution leaves no injury that is redressable against defendants Connell and Morgestern.

and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party adverse to a motion for summary judgment may not simply deny generally the pleadings of the movant; the adverse party must designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); see Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Simply put, "a summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data." Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). The non-moving party must show more than a mere "metaphysical doubt" as to the material facts. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986).

A. Adequacy of Notices Mailed by CSEA

Nonunion public employees can be compelled to pay their *pro rata* share of the costs of collective bargaining, contract administration, and grievance adjustment. See Hudson, 475 U.S. at 294. However, public employees cannot be compelled to support ideological causes that they oppose. See Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977) "[T]he Constitution requires that such expenditures be financed from charges, dues or assessments paid by employees who do not object to advancing [6]those ideas . . . . " Id. at 325-26.

In Hudson, the Supreme Court considered the procedural safeguards necessary to protect nonmembers' First Amendment rights. Hudson, 475 U.S. at 302. "The objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting [a union's] ability to require every employee to contribute to the cost of collective-bargaining activities." Id.

According to the Court, the minimal procedural requirements for deducting union fees from nonmembers paychecks include "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." Id. at 310. To comply with Hudson, unions generally send a "Hudson notice" to nonmembers.

1. Adequacy of the April and June Notices

The April and June notices were not adequate under Hudson because they did not adequately explain the basis for the fee. Specifically, the union failed to provide a copy of the Audit in the absence of a fee payer's formal request. Accordingly, plaintiffs are entitled to summary judgment with respect to these two notices.

Hudson requires that unions provide "adequate" or "sufficient" financial disclosure so that nonmember employees may "gauge the propriety of the union's fee." Hudson, 475 U.S. at 306. The union must provide nonmembers an "adequate explanation of the basis for the fee." Id. at 310. "The union need not [7]provide non-members with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor." Id. at 307 n.18.

The Ninth Circuit has held that an adequate explanation of the basis of the fee includes an audit verifying that the union "actually spent the amounts of money it claimed to have spent on the chargeable activities." See Knight v. Kenai Peninsula Borough Sch. Dist., 131 F.3d 807, 813 (9th Cir. 1997); see also Prescott v. El Dorado County, 177 F.3d 1102, 1107-08 (9th Cir. 1999) ("real independent verification of the financial

data in question" required under Hudson), vacated in part and remanded, 528 U.S. 1111 (2000), reinstated in part and remanded, 204 F.3d 984 (9th Cir. 2000).

The Ninth Circuit has not explicitly addressed whether an auditor's report must be provided to nonmembers without a formal request.[4] The Sixth Circuit, however, has addressed this issue. In Damiano v. Matish, 830 F.2d 1363 (6th Cir. 1987), the Sixth Circuit held that:

> Hudson also mandates the verification of the union's calculations and disbursements from the fund by means of an independent auditor. . . . Morever, the union must provide this information to each employee, without formal request and within a reasonable period of time, to permit the employee to evaluate the calculation of the fees in order to make a reasonable appraisal of the fees . . . .

Id. at 1370. The Sixth Circuit's holding serves the policy behind Hudson, which is to ensure that nonmembers are provided **[8]**with sufficient information so that they can verify the expenditures without the burden of making a formal request.

The April notice did not serve the policy behind Hudson because it contained no financial disclosures. Although the June notice did contain the "1998 Expenditure Report," this report does not satisfy Hudson. The report stated:

> The information in this report on the amount of CSEA's expenditures in each of these categories in 1998 is taken from the independent audit of CSEA's 1998 financial

---

[4] In Prescott, an audit was included in the notice and thus accessibility of the audit was not an issue.

> records contained in the Financial Statements prepared by Gibson and Company, Inc., a certified public accounting firm.

(Compl., Ex. F). The report did not include an actual copy of the audit, but offered to send a copy of the audit upon request. (See id.).

Offering to send an audit upon request does not allow plaintiffs to "gauge the propriety of the union's fee," Hudson, 475 U.S. at 306, nor does it tell the fee payers that the union actually spent the money the way that it claimed. See Knight, 131 F.3d at 813. In order to analyze the data for themselves, plaintiffs would have to either accept defendants' word that the expenditures were audited, or make a formal request for the audit. Therefore, the explanation was inadequate, and plaintiffs are entitled to summary judgment as to the April and June notices.

2. January 2000 Notices

Plaintiffs challenge both notices mailed in January. The first notice was mailed on or about January 14, 2000, and included the Audit. It was inadequate as a matter of law because it did not provide plaintiffs with a reasonable opportunity to object. The second "amended" notice was mailed on January 25, [9]2000, for the purpose of extending a prior deadline to allow plaintiffs a reasonable opportunity to object to the Audit. The court finds that it was likewise inadequate under Hudson.

The amended notice of January 25 directed fee payers to the June notice and the previously mailed Audit, and stated: "These documents together explain why the [CSEA] has set the ["fair share"] fee at 88.5% of dues." (Haagensen Decl., Ex. B,

Attached to CSEA's First Motion for Summary Judgment). In denying plaintiffs' second motion for preliminary injunction, this court noted:

> Although plaintiffs knew as of the date of the first hearing for preliminary injunction that defendants were only planning to send a copy of the audit to the fee payers, they did not make it clear at the time of that hearing that they thought defendants needed to send a new, complete notice with the audit.

(Memorandum and Order filed Feb. 29, 2000, at 8). Defendants have made a good faith effort, under the court's direction, to correct the apparent defects in the notices. See id. (recognizing that in an attempt to reach a resolution satisfactory to plaintiffs, the court itself may have led defendants into the "piecemeal" approach of correcting the apparent defects). Nevertheless, the court previously acknowledged that it was possible that plaintiffs may ultimately succeed in establishing that the "piecemeal remedial measures" were inadequate under Hudson. See id. at 7-8.

The First Amendment requires that the procedure for collecting fair share fees "be carefully tailored to minimize the [inherent] infringement" on nonmembers' constitutional rights. Hudson, 475 U.S. at 303; see id. at 307 n.20 ("the agency shop [10]itself is 'a significant impingement on First Amendment rights'" (quoting Ellis, 466 U.S. at 455)). This requirement is satisfied in part when nonmembers are give sufficient information from which to "gauge the propriety of the union's fee." Hudson, 475 U.S. at 306; see id. at 310 (also requiring a reasonably prompt opportunity to challenge the amount of the fee, and an escrow for the amounts reasonably in dispute).

The court has already concluded here that Hudson requires the union to provide a copy of the Audit without formal a request by plaintiffs. "The purpose of an audit is to have an independent accountant determine whether the union has actually spent the amounts of money it claimed to have spent on the chargeable activities." Knight, 131 F.3d at 813. This information must be provided "within a reasonable amount of time" to allow nonmembers to gauge the propriety of the fee. Damiano, 830 F.2d 1363, 1370.

In order to verify the union's expenditures for chargeable activities, plaintiffs must cross-reference the Audit provided in January with the "1998 Expenditure Report" included in the June notice, which identifies the chargeable and nonchargeable expenditures. The court does not conclude that the law requires that non-union members in all cases be provided a single integrated notice in order to satisfy the requirements of Hudson. However, the court finds that the separation of almost six months between the necessary components for explaining the basis of the fee in this case did not minimize the inherent infringement on plaintiffs' First Amendment rights. Accordingly, the amended notice, which incorporated by reference the June [11]notice and the Audit, did not meet the requirements of Hudson. Therefore, plaintiffs are entitled to summary judgment as to both notices mailed in January of 2000.

B. Compensable Harm

Defendants argue that plaintiffs have not suffered compensable harm because the deduction of union dues from nonmembers paychecks was followed by a proper Hudson notice in May of 2000 and a new opportunity to object to prior deductions.

In Grunwald v. San Bernardino City Unified School District, 994 F.2d 1370 (9th Cir. 1993), the Ninth Circuit considered whether the use of a "deduction-escrow-refund" procedure for the payment of agency fees violated the First Amendment. In that case, the union deducted full union dues from the paychecks of nonmembers and placed the fees in an escrow account. Thereafter, the union mailed a Hudson notice to nonmembers and allowed them to seek a rebate for the portion of dues representing expenditures that were not germane to collective bargaining. The Ninth Circuit held that such a method did not violate the First Amendment because the escrow procedure ensured that money collected from nonmembers would "not be used, even temporarily, for ideological purposes." Id. at 1374, see also Hudson, 475 U.S. at 305-307. Further, the court emphasized that the union reasonably accommodated the nonmembers' First Amendment interests by providing adequate notice as soon as practicable, and a prompt refund. Grunwald, 994 F.2d at 1375-76; see also Knight, 131 F.3d at 812 ("as soon as practicable, the union must send out proper notices").

[12]This case is materially different from Grunwald. Here, defendants began deducting fees from plaintiffs' paychecks in April 1999. However, defendants did not reduce the fees in advance to reflect only those expenditures that are germane to collective bargaining.[5] Nor have defendants demonstrated that nonmembers' fees were never used, even temporarily, for ideological purposes. The court finds no support in the record

---

[5] The fees paid by nonmembers were reduced only to exclude expenditures relating to member-only benefits, such as group insurance plans and entertainment discounts. The fees were not reduced in advance to exclude expenditures such as charitable donations and legislative advocacy.

to conclude, consistent with Grunwald, that plaintiffs' fees (both objectors and non-objectors) were placed in escrow beginning with the initial deductions in April 1999. Further, plaintiffs did not receive adequate notice under Hudson until May of 2000, almost thirteen months after the initial deduction.

In contrast, the plaintiffs in Grunwald received adequate notice no later than fifteen days after the initial deduction. Although the May notice is retroactive, the court cannot conclude, as a matter of law, that the May notice constitutes a reasonable accommodation of plaintiffs' First Amendment right to a "fair, prompt and effective procedure." Grunwald, 994 F.2d at 1373; see also Ellis, 466 U.S. at 440-41 ("By exacting and using full dues, then refunding months later the [non-chargeable] portion, the union effectively obtains an involuntary loan for purposes to which the employee objects."); Knight, 131 F.3d at 812 (stating that "as soon as practicable, union must send out proper notices"). Therefore, defendants have [13]not demonstrated that plaintiffs have suffered no compensable harm. See Knight, 131 at 812 (finding that union's refund of monies received is relevant to amount of damages, but does not moot claims under Hudson).

C. Appropriate Relief

Plaintiffs argue that all non-union members, both objectors and non-objectors, are entitled to full restitution of deductions made prior to May 2000. In the alternative, plaintiffs request that the court "adjudicate the appropriately chargeable fee," and award restitution of the non-chargeable deductions. The court treats plaintiffs' alternative request as a challenge to the propriety of the "fair share" fee calculated in the May notice. The court considers first whether plaintiffs are entitled to full or partial restitution, and second, because defendants have raised

the issue on summary judgment, whether there are any triable issues with respect to CSEA's determination of the chargeable "fair share" fee.

1. Refund of Non-Chargeable Portion of the Fee

Under Prescott, plaintiffs are not entitled to full restitution of the deducted fees. See Prescott, 177 F.3d at 1109 (finding that "demand for full restitution was punitive insofar as it sought to deprive the union of fees to which it was, doubtlessly, entitled"). However, plaintiffs may recover the portion of the fees collected for expenditures that are not "germane" to the union's collective-bargaining activity. See Abood, 431 U.S. at 238 (discussing restitution as an appropriate remedy); see also Lehnert v. Ferris Faculty Ass'n, 500 U.S. 506, 519 (1991) ("chargeable activities must . . . be 'germane' to [14]collective-bargaining").

In awarding partial restitution, the court is not presuming dissent by all nonmembers. See Abood, 431 U.S. at 238 ("dissent is not to be presumed" (quoting International Ass'n of Machinists v. Street, 367 U.S. 776, 774 (1961)). Rather, the court finds that plaintiffs had no burden to object where, as here, deductions were made in the absence of a reasonably prompt notice that satisfied the requirements of Hudson. See Hudson, 475 U.S. at 309 (finding certain requirements necessary to minimize both the impingement on nonmembers' First Amendment interests and their burden of objection); Airline Pilots v. Miller, 523 U.S. 866, 878 (1998) ("The very purpose of Hudson's notice requirement is to provide employees sufficient information to enable them to identify the expenditures that, in their view, the union has improperly classified as germane."). Therefore, the court concludes that all class-members, not just those who objected to non-germane

expenditures pursuant to the May notice, are entitled to a refund of the non-chargeable portion of their "fair share" fee payments for the 1999 fee payer year.[6]

2. Chargeable Expenditures

Plaintiffs contend that "all of CSEA's expenditures are legally non-chargeable," and defendants have the burden of demonstrating "from contemporaneous hard data" that all the activities charged to fee payers were germane to collective bargaining. (Opp'n at 55:18-20, 56:18-22, 57).

[15]In Airline Pilots v. Miller, 523 U.S. 866 (1998), the Supreme Court recognized that while "the nonunion employee has the burden of raising an objection, . . . the union retains the burden of proof." Miller, 523 U.S. at 877 (quoting Hudson, 475 U.S. at 306). However, a plaintiff who is challenging the calculation of an agency fee cannot "file a generally-phrased complaint, then sit back and require the union to prove the 'germaneness' of its expenditures without a clue as to 'which of its thousands of expenditures' the objectors oppose." Miller, 523 U.S. at 878. In federal court, "agency-fee challengers, like all other civil litigants, must make their objections known with the degree of specificity appropriate at each stage of litigation . . . ." Id.

Pursuant to Miller, plaintiffs must "point to the expenditures or classes of expenditures [they] find questionable" with the degree of specificity appropriate on summary judgment. Miller, 523 U.S. at 878. Plaintiffs claim that CSEA

---

[6] Defendants claim that by the end of March 2001, all objectors received a refund of the entire non-chargeable portion of the 1999 "fair share" fee, with interest, according to the fee calculation provided in the May notice.

"Board of Directors" meetings, and "other meetings regarding association governance," were not 100% chargeable because those meetings involved activities of a political nature. (Pls.' Opp'n at 57:10-13); (Defs.'s Ex. B at 14:3-7, Attached to Gibbons Decl.). Plaintiffs further claim that a CSEA employee, Cathy Hackett, improperly recorded a non-chargeable activity as chargeable to fee payers on her time sheet. (Pls.' Opp'n at 57:4-9). Plaintiffs have not pointed to any other expenditures that they **[16]**claim were improperly charged.[7]

Defendants argue that the expenditures challenged by plaintiffs are chargeable as a matter of law. In Lehnert, the Supreme Court held that "chargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." Lehnert, 500 U.S. at 519. The Supreme Court has recognized that the test for determining whether expenditures are germane to collective bargaining, and thus chargeable to nonmembers, is "whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." Ellis, 466 U.S. at 448; see also Lehnert,

---

[7] Plaintiffs have previously challenged expenditures relating to the organizing costs of an affiliate union, the "Service Employees International Union" ("SEIU"). However, defendants note that the May notice categorized SEIU organizing expenditures as non-chargeable and accordingly lowered the chargeable fee. Thus, CSEA's calculation of the "fair-share" fee does not include SEIU organizing expenditures, and plaintiff's challenge to this expenditure is accordingly moot.

500 U.S. at 523 (extending the reasoning of Ellis to public-sector unions). The Court has "never interpreted that test to require a direct relationship between the expense at issue and some tangible benefit to the [nonmembers'] bargaining unit." Lehnert, 500 U.S. at 522.

In Ellis, the Supreme Court considered whether certain expenditures were germane to collective bargaining. See 466 U.S. [17]at 448-455 (considering expenses related to national union conventions, social activities, publications, and organizing efforts outside the bargaining unit). The Court had "very little trouble in holding that [nonmembers] must help defray the costs of [national] conventions." Id. at 448. The Court concluded that such events were chargeable despite the fact that the convention activities included major addresses by prominent politicians. But see id. at 459 (Powell, J., dissenting) (suggesting that the union should be required to make "reasonable estimates" of expenses fairly attributable to political activities and make "appropriate deductions from the dues of objecting employees").

According to the Court in Ellis, "if a union is to perform its statutory function [as an exclusive bargaining representative], it must maintain its corporate or associational existence, must elect officers to manage and carry on its affairs, and may consult its members about overall bargaining goals and policy." Id. at 448. The Court emphasized that unions must have a "certain flexibility" in their use of compelled funds. Id. at 456. (stating that expenses related to union conventions and publications are "well within the acceptable range" of costs reasonably incurred for collective bargaining purposes). Further, the Court found that because the costs associated with conventions "relate to the work of the union in the realm of collective bargaining," such expenses are justified by the governmental interest in

overcoming the free-rider problem. Id. Allowing such expenses imposes "little additional infringement on First Amendment rights beyond that already [18]accepted" in the nature of the agency shop itself. Id.

Like conventions, board meetings "are a standard feature of union operations." Id. at 450; see also Abood, 431 U.S. at 223 ("The furtherance of the common cause leaves some leeway for the leadership of the group." (quoting Machinists v. Street, 367 U.S. 776, 778 (1961)). The Court in Ellis did not hold that unions must allocate time spent during such meetings for germane and non-germane activities. Requiring a union to apportion time spent during board meetings would remove the flexibility necessary for the union's performance of its function as an exclusive collective bargaining representative. See Fell v. Independent Association of Continental Pilots, 26 F. Supp. 2d 1272, 1280-81 (D. Colo. 1998) (finding that "the expenses surrounding the Board of Director's meetings are germane."). Therefore, the court finds that costs associated with board meetings, and other meetings related to the governance of the union as a collective bargaining representative, are germane and chargeable as a matter of law.

Plaintiffs also claim that a CSEA employee, Cathy Hackett, improperly recorded "organizing campaign" activity as chargeable to fee payers on her time sheet. In Ellis, the Court held that organizing expenses associated with the recruitment of employees outside the bargaining unit are not chargeable because such costs are not justified by the governmental interest in overcoming the free-rider problem. See Ellis, 466 U.S. at 452. Here, defendants have offered uncontroverted evidence that the notation "organizing campaign," referred to a "contract campaign" in which Cathy Hackett organized existing bargaining [19]unit members to discuss contract proposals and

generate support among unit members for CSEA's position at the bargaining table. (See Hackett Decl. ¶¶ 4-5) ("Among other things, the campaign publicized CSEA's bargaining proposals, organized rallies in support of CSEA's bargaining teams, and conducted worksite meetings at which the progress of negotiations and related matters were discussed."). Unlike in Ellis, the costs associated with Cathy Hackett's organizing activity were necessarily and reasonably incurred for CSEA's purpose of performing its duties as a collective bargaining representative. Plaintiffs have not offered any evidence to dispute defendants' showing. Therefore, the expenditures are germane and thus, chargeable to fee-payers.

In sum, defendants are entitled to summary judgment on plaintiffs' challenge to the propriety of the "fair share" fee. The court will accordingly award partial restitution based on CSEA's calculation of the non-chargeable portion of the "fair share" fee. Pursuant to the May notice, CSEA's calculation of non-germane expenditures is twenty-seven percent of regular membership dues at the fee-payer's salary level for the 1999 fee-payer year.[8] (See Defs.' Ex. C, Attached to Harrigan Decl. in Support of CSEA's First Motion for Summary Judgment, filed July 6, 2000). Plaintiffs who did not object under the May notice paid ninety-three percent of regular membership dues as their **[20]**"fair share" fee. See id. Thus, the appropriate restitution

---

[8] Plaintiff has filed an evidentiary objection to defendants' Exhibit A, attached to the declaration of Patrick Haagensen in support of CSEA's Second Motion for Summary Judgment. Exhibit A appears to be a copy of the Supplemental Award and Opinion issued in arbitration proceedings which took place during June and August 2000. The court has not made any reference to Exhibit A in making its determination, and thus need not rule on the document's admissibility.

for those plaintiffs who have not yet received a refund is twenty percent of regular membership dues at the fee-payer's salary level.

3. Permanent Injunctive Relief

In their prayer for relief, plaintiffs seek a "permanent injunction prohibiting [d]efendants from taking any action to demand or collect from plaintiffs and class members, by any means, so-called 'fair share fees,' and from taking any other action to enforce the 'fair share fee' provisions of the State/CSEA memoranda of understanding, . . . until a constitutional agency fee seizure approved by this Court is established and operating." (Comp. at 14:14-18). Plaintiffs agreed during oral argument that the May notice, provided for the 1999 fee payer-year, satisfied the requirements of Hudson. It is further undisputed that defendants mailed a Hudson notice for the 2000 fee payer-year consistent with the satisfactory format of the May notice. Accordingly, a constitutional agency-fee collection procedure is established and operating, and injunctive relief is no longer warranted.

C. Validity of Indemnification Provisions

Plaintiffs argue that the collective bargaining agreements contain an indemnification provision that is "void as against public policy" because the provision creates disincentives for defendants' protection of plaintiffs' **[21]**constitutional rights.[9]

---

[9] Each agreement contains the following indemnification provision:

> The Union agrees to indemnify, defend, and hold the State and its agents harmless against any claims made of any nature and against any suit instituted against the State arising from . . .

(continued...)

Defendants argue that plaintiffs do not have standing to contest the provisions and further, that the provisions do not violate public policy.

In Prescott v. County of El Dorado, 177 F.3d 1102 (9th Cir. 1999), the Ninth Circuit affirmed the district court's holding that a public employee lacked standing to challenge an indemnification provision in a collective bargaining agreement between a labor union and a public employer. The Supreme Court vacated and remanded the Ninth Circuit's decision for consideration in light of Friends of the Earth v. Laidlaw Environmental Servs., 528 U.S. 167 (2000).[10]

In Prescott, the Ninth Circuit acknowledged that the plaintiffs suffered some injury when fees were deducted from their paychecks, but concluded that the plaintiffs could not demonstrate that the injury was fairly traceable to the indemnification provision. See Prescott, 177 F.3d at 112. The court characterized the plaintiffs' claim that "the provision will somehow cause the [public employer] to ignore its own

---

[9] (...continued)
payroll deductions . . . .
(Pls.' Ex. A(1), Art. 4, sec 3.2(b), Attached to Plaintiffs' Statement of Undisputed Material Facts).

[10] The Ninth Circuit then vacated and remanded the district court's standing determination. See Prescott, 204 F.3d 984 (reinstating its prior decision in part). In an order filed April 17, 2001, Judge Karlton granted defendants' motion for summary judgment, finding that the plaintiffs did not have standing to challenge the indemnification provision. Prescott, No. 95-1859 LKK/JFM.

[22]duties" as "rank speculation." The court finds nothing in Laidlaw that alters this conclusion.[11]

Plaintiffs offer no evidence of defendants' motivation with respect to the indemnification clause. Instead, plaintiffs contend that "the principle of res ipsa loquitur would seem to apply to [indemnification] clauses which appear only within forced-unionism provisions" of collective bargaining agreements. However, the existence of the provision alone cannot satisfy plaintiffs' burden to show that their alleged harm is fairly traceable to the indemnification provision. See Lujan, 504 U.S. at 561 ("The party invoking federal jurisdiction bears the burden of establishing these [standing] elements.").

Further, the Ninth Circuit held that the plaintiffs' claim that their injury would be redressed by a favorable decision striking the indemnification provision was also based on pure speculation. Id. ("[I]t can hardly be said that our striking down of the provision would lead to some irenic world wherein all fee deduction procedures were properly followed because someone would finally have an incentive to assure that they were."). Laidlaw appears to alter this analysis only by adding the principle that a remedy affords redress for the threat of contin-

---

[11] The Supreme Court alluded to the causal inquiry when it concluded that it saw "nothing improbable" about the proposition that the defendants' alleged discharge of illegal pollutants into a river caused the plaintiffs' to curtail their recreational use of the waterway. However, the Court made this determination in the context of whether the plaintiffs' suffered an injury in fact that was not conjectural or hypothetical. Accordingly, this court does not interpret Laidlaw to create a "nothing improbable" standard for determining whether a plaintiff's injury is fairly traceable to the challenged conduct.

uing violations when it "encourage[s] defendants to **[23]**discontinue current violations and deter[s] them from committing future ones." Laidlaw, 528 U.S. at 186. The Supreme Court acknowledged, however, that "there may be a point at which the deterrent effect of a [remedy] becomes so insubstantial or so remote that it cannot support . . . standing." Id.

Plaintiffs argue that "the threat of future violations would be redressed by entry of prospective declaratory and injunctive relief prohibiting" enforcement of the indemnification clause, and "thus forcing [defendant] Connell to execute her duties absent the umbrella of indemnification provided by the clause." (Opp'n at 25:1-3). In order to prevail on this argument, plaintiffs must first demonstrate that the threat of future violations is an injury that is "actual or imminent, not conjectural or hypothetical." Laidlaw, 528 U.S. at 180-81.

In Los Angeles v. Lyons, 461 U.S. 95 (1983), the Supreme Court denied standing on the ground that the plaintiff could not credibly allege that he faced a realistic threat of future harm. Lyons, 461 U.S. at 108. In Lyons, the plaintiff sought to enjoin the use of police chokeholds because "he feared he would be choked in any future encounter with the police." Id. at 107, n.8. Like in Lyons, plaintiffs' alleged injury is based on their fear that defendants will commit future violations as a result of the indemnification clause. Under Lyons, "[i]t is the reality of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions." Id. "The reasonableness of [plaintiffs'] fear is dependent upon the likelihood of a recurrence of the allegedly unlawful conduct." Id.

[24]Plaintiffs have not only failed to establish any previous injury that was traceable to the indemnification provision, but they have also failed to show that defendants' allegedly unlawful

conduct, i.e. the deduction of fees without an adequate explanation for the basis of the fee, will likely recur. The court will not presume that defendants will act unlawfully in the future. See O'Shea, 414 U.S. at 497 (declining to assume that unlawful conduct will occur as a condition to finding a real and immediate threat of harm). Plaintiffs' anticipation of future harm is not "sufficiently real and immediate" to establish an injury that is imminent, as opposed hypothetical. Therefore, plaintiffs cannot show an injury in fact based on the threat of future harm.

Even if plaintiffs could establish imminent harm as a result of the indemnification provision, plaintiffs cannot show that injunctive relief would redress their injury. In order to find that prospective relief would deter such harm, the court must accept the unreasonable premise that the provision's existence somehow encourages defendants to disregard their duties. In the absence of any evidence of defendants' motivation with respect to the indemnification provision, the existence of a deterrent effect is no more than "rank speculation." Therefore, plaintiffs have failed to establish the elements of standing, and defendants are entitled to summary judgment on this claim.

IT IS THEREFORE ORDERED that plaintiffs' motion for summary judgment be, and the same hereby is, GRANTED with respect to the April, June, and January notices. IT IS FURTHER ORDERED that defendants' motions regarding the propriety of the "fair [25]share" fee, and plaintiffs' standing to challenge the indemnification provision, be, and the same hereby are, GRANTED. Defendant CSEA shall return to all plaintiffs who paid "fair share" fees for the 1999 fee-payer year, and who have not yet received an equivalent refund, twenty percent of regular membership dues at the fee-payer's salary

level for the 1999 fee-payer year, with interest.[12] All other relief prayed for in the complaint is denied.

IT IS SO ORDERED.

DATED: May 2, 2001

/s/
WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

---

[12] See supra, at 19-20 (explaining that this figure is based on CSEA's calculation of the non-chargeable portion of the "fair share" fee under the May notice).

APPENDIX F

UNITED STATES CONSTITUTION
Article III

UNITED STATES CONSTITUTION
Article III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States . . . .

UNITED STATES CONSTITUTION
First Amendment

The First Amendment provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX H

UNITED STATES CONSTITUTION
Fourteenth Amendment

UNITED STATES CONSTITUTION
Fourteenth Amendment

The Fourteenth Amendment provides in pertinent part:

> **Section 1.** . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX I

CIVIL RIGHTS ACT OF 1871
42 U.S.C. § 1983 (West Supp. 2000)

CIVIL RIGHTS ACT OF 1871
42 U.S.C. § 1983 (West Supp. 2000)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

APPENDIX J

CALIFORNIA GOVERNMENT CODE
Section 3513(k)

CALIFORNIA GOVERNMENT CODE
Section 3513(k)

§ 3513. Definitions

As used in this chapter:

* * * *

(k) "Fair share fee" means the fee deducted by the state employer from the salary or wages of a state employee in an appropriate unit who does not become a member of and financially support the recognized employee organization. The fair share fee shall be used to defray the costs incurred by the recognized employee organization in fulfilling its duty to represent the employees in their employment relations with the state, and shall not exceed the standard initiation fee, membership dues, and general assessments of the recognized employee organization.

CALIFORNIA GOVERNMENT CODE
Section 3515

§ 3515. Employee organizational rights; maintenance of membership; fair share fee; self representation

Except as otherwise provided by the Legislature, state employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer -employee relations. State employees also shall have the right to refuse to join or participate in the activities of employee organizations, except that nothing shall preclude the parties from agreeing to a maintenance of membership provision, as defined in subdivision (i) of Section 3513, or a fair share fee provision, as defined in subdivision (k) of Section 3513, pursuant to a memorandum of understanding. In any event, state employees shall have the right to represent themselves individually in their employment relations with the state.

Supreme Court, U.S.
FILED
APR 24 2003
OFFICE OF THE CLERK

No. 02-1493

IN THE

Supreme Court of the United States

CHRISTINE A. CUMMINGS; JANET TAYLOR DARVAS; RICHARD K. DEHART; CHRISTOPHER GARBANI; PATRICIA A. MCCUMSEY; DANIEL NOWALIS; CLAUDIA STEWART; AND THE CLASS THEY REPRESENT,
Petitioners,

v.

KATHLEEN CONNELL; MARTY MORGENSTERN; AND CALIFORNIA STATE EMPLOYEES ASSOCIATION, LOCAL 1000, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO-CLC,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPPOSITION OF CSEA, LOCAL 1000 TO PETITION FOR WRIT OF CERTIORARI

ANNE M. GIESE
Chief Counsel
HARRY J. GIBBONS
CALIFORNIA STATE EMPLOYEES ASSOCIATION, Local 1000, SEIU, AFL-CIO, CLC
1108 "O" Street, Suite 327
Sacramento, California 95814
(916) 326-4208

April 2003

STEPHEN P. BERZON
Counsel of Record
JEFFREY B. DEMAIN
EILEEN B. GOLDSMITH
ALTSHULER, BERZON, NUSSBAUM, RUBIN & DEMAIN
177 Post Street, Suite 300
San Francisco, California 94108
(415) 421-7151

Attorneys for Respondent CSEA, Local 1000

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	4
I. THIS COURT SHOULD DENY THE PETITION FOR THE SAME REASONS THAT IT RECENTLY DID SO IN THE *PRESCOTT* AND *FOSTER* CASES, WITH REGARD TO THE ISSUES OF PUBLIC EMPLOYER LIABILITY, FEE PAYERS' STANDING TO CHALLENGE THE FAIR SHARE FEE INDEMNIFICATION AGREEMENT, AND THE CONSTITUTIONALITY OF THE INDEMNIFICATION AGREEMENT	5
II. PETITIONERS HAVE FAILED TO IDENTIFY A CONFLICT ON THE REMEDIAL ISSUE WARRANTING A GRANT OF *CERTIORARI*	7
A. There Is No Conflict with Regard to Full Restitution to All Fee Payers of the Entire Fair Share Fee	7
B. There Is No Conflict with Regard to Restitution to All Fee Payers of the Non-Chargeable Portion of the Fair Share Fee	11
CONCLUSION	14

TABLE OF AUTHORITIES

CASES	Page
Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977)	8
Browne v. Wisconsin Employment Relations Comm'n, 169 Wis. 2d 79 (1992)	12, 13
Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986)	7, 8
Elvin v. Oregon Public Employees Union, 313 Or. 165 (1992)	9
Foster v. Garcy, __ U.S. __, 122 S.Ct. 2327 (2002)	4, 6
Foster v. Madhesian, 268 F.3d 689 (9th Cir. 2001), *cert. denied sub nom Foster v. Garcy*, 122 S.Ct. 2327 (2002)	6
Gibney v. Toledo Bd. of Educ., 40 Ohio St. 3d 152, 532 N.E.2d 1300 (1988)	9, 10
Lowary v. Lexington Local Bd. of Educ., 854 F.2d 131 (6th Cir. 1988)	10
Lowary v. Lexington Local Bd. of Educ., 903 F.2d 422 (6th Cir. 1990)	11, 13
Prescott v. County of El Dorado, 177 F.3d 1102 (9th Cir. 1999), *vacated and remanded in other part*, 528 U.S. 1111, *reinstated in relevant part on remand*, 204 F.3d 984 (9th Cir. 2000)	8
Prescott v. County of El Dorado, 298 F.3d 844 (9th Cir. 2002), *cert. denied*, 123 S.Ct. 1251 (2003)	6
Prescott v. County of El Dorado, __ U.S. __, 123 S.Ct. 1251 (2003)	4, 5
Tierney v. Toledo, 824 F.2d 1497 (6th Cir. 1987)	10
Wareham Educ. Ass'n v. Mass. Labor Relations Comm'n, 430 Mass. 81 (1999)	9

TABLE OF AUTHORITIES—Continued

Page

Weaver v. Univ. of Cincinnati, 970 F.2d 1523 (6th Cir. 1992) 11, 12

Wessel v. City of Albuquerque, 299 F.3d 1186 (10th Cir. 2002) 11, 12

IN THE

Supreme Court of the United States

No. 02-1493

CHRISTINE A. CUMMINGS; JANET TAYLOR DARVAS; RICHARD K. DEHART; CHRISTOPHER GARBANI; PATRICIA A. MCCUMSEY; DANIEL NOWALIS; CLAUDIA STEWART; AND THE CLASS THEY REPRESENT,
Petitioners,

v.

KATHLEEN CONNELL; MARTY MORGENSTERN; AND CALIFORNIA STATE EMPLOYEES ASSOCIATION, LOCAL 1000, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO-CLC,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPPOSITION OF CSEA, LOCAL 1000 TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners Christine A. Cummings, *et al.* (hereinafter "Petitioners") have omitted from their Statement of the Case certain facts which are crucial to the Court's evaluation of Petitioners' fourth Question Presented, which challenges the Court of Appeals' remedial decision that the certified class of fair share fee payers is not entitled to an award of the return of either all of the fees collected or the so-called "non-chargeable" portion thereof. Specifically, Petitioners neglect

to mention that the *only* flaw in the relevant fair share fee notice was the omission of the auditor's verification and that, prior to the entry of summary judgment in the district court, the union corrected and reissued the notice, gave fee payers a new opportunity to object to or challenge the notice, and refunded the non-chargeable portion of the fee to all fee payers who timely did so. We set forth those facts in detail below, so that the Court may have a sufficient understanding of the case to assess the issues presented by Petitioners.

First, the *sole* flaw found by the district court and the Court of Appeals in the *Hudson* notice issued in June 1999 by Respondent California State Employees Association, Local 1000, Service Employees International Union, AFL-CIO-CLC (hereinafter "CSEA"), was that CSEA omitted to include with that notice a copy of the independent auditor's report verifying the financial disclosure contained in the notice. It is not disputed that (1) the financial disclosure contained in the notice had in fact been audited and verified by an independent auditor; (2) the fee payers were informed in the notice that the financial disclosure had been audited and verified by an independent auditor; (3) the fee payers were informed in the notice of the name of the independent auditor; and (4) the fee payers were informed in the notice that a copy of the audit would be provided to them upon request. *See* Pet. App. A at 3a-4a. Thus, the *only* legal deficiency in the June 1999 notice was the omission of the auditor's verification. *See id.* at 8a ("In a case such as this one, in which the Union contends that the relevant figures were simply lifted from an audited financial statement, it should suffice for the notice to include a certification from the independent auditor that the summarized figures have indeed been audited and have been correctly reproduced from the audited report"). Petitioners do not seek review of any of these findings or conclusions.

Second, CSEA acted in good faith at all times, even going beyond what was legally required, and completely remedied

prior to the entry of summary judgment whatever harm fee payers might have incurred through the omission of the auditor's verification. Thus, in May 2000, within months after the case was filed, CSEA issued fee payers a corrected *Hudson* notice which contained complete copies of both the audited Financial Statements and the audited allocation of CSEA's major categories of expenditure between "chargeable" and "non-chargeable" classifications, as well as a recapitulation of the information set forth in its prior notices. *Id.*, App. A at 4a. The May 2000 notice also provided fee payers with a new opportunity to submit objections or challenges to the notice and thereby obtain refunds of the non-chargeable portion of the fee, plus interest, retroactive to the beginning of the fee year. *Id.*, App. A at 4a, 13a. As the Court of Appeals held, "It is undisputed that this notice complied with *Hudson*." *Id.*, App. A at 4a; *see also id.*, App. E at 36a. It is also undisputed that, prior to the entry of summary judgment by the district court, "[a]ny fee payer who had objected to any of the notices from April 1999 to May 2000 then received a refund of the nonchargeable amount of the fee, with interest, retroactive to April 1999." *Id.*, App. A at 5a; *see also id.*, App. E at 36a.

Further, both the district court and the Court of Appeals found that CSEA acted in good faith at all relevant times (*see id.*, App. A at 4a., 15a; *id.*, App. E at 41a), a finding which Petitioners do not seek to challenge here.[1] On the basis of CSEA's correction and reissuance of the *Hudson* notice, its extension of the objection/challenge period, and its provision of a refund with interest retroactive to the beginning of the fee year to any fee payer who timely requested one, the Court of

---

[1] Indeed, both the district court and the Court of Appeals acknowledged that any delay in the issuance of the May 2000 notice was attributable to the district court's interim orders and comments during hearings which failed to provide clear guidance as to what was required. *Id.*, App. E at 41a; *see also id.*, App. A at 4a, 15a.

Appeals held that no further compensatory remedy was warranted or permissible. Pet. App. A at 15a.

REASONS FOR DENYING THE WRIT

The Petition should be denied because it presents no important issue which requires the attention of this Court and, moreover, identifies no square conflict between the circuits or between the Court of Appeals' decision and a decision of this Court:

First, this Court has recently denied a Petition for Writ of *Certiorari* from a decision of the Ninth Circuit filed by the same counsel from the National Right to Work Legal Foundation, Inc. (hereinafter "Right to Work") who represents Petitioners here, raising the second and third questions that Petitioners seek to raise here. *See Prescott v. County of El Dorado*, __ U.S. __, 123 S.Ct. 1251 (2003). Moreover, prior to that, this Court denied a Petition for Writ of *Certiorari* from another decision of the Ninth Circuit filed by Right to Work raising the first question that Petitioners seek to raise here. *See Foster v. Garcy*, __ U.S. __, 122 S.Ct. 2327 (2002). For the same reasons that the Court denied the petitions in *Prescott* and *Foster*, it should deny the Petition here. *See* Section I.

Second, as to the fourth question that Petitioners seek to raise here, they fail to identify any circuit conflict as to the denial of the relief they requested, restitution to all fee payers of all fair share fees collected prior to the May 2000 Notice. Instead, they rely on a purported conflict between four federal circuits and one state supreme court, on the one hand, and three other state supreme courts, on the other hand. Upon examination, however, that "conflict" is easily seen to be illusory. Further, although Petitioners purport to identify a circuit conflict as to the reversal of the district court's award of restitution to all fee payers of the non-chargeable portion of the fee collected prior to the May 2000 notice, that conflict is

illusory, as well. Two of the cases relied on by Petitioners as supporting restitution to all fee payers of the non-chargeable portion of the fee in fact do not support that remedy. The other two decisions relied on by Petitioners did not involve facts comparable to the present case, in which the union corrected and reissued the *Hudson* notice, gave fee payers a new opportunity to object to or challenge the notice, and provided refunds of the non-chargeable portion of the fee (plus interest) to all who did so in a timely manner. *See* Section II.

I. THIS COURT SHOULD DENY THE PETITION FOR THE SAME REASONS THAT IT RECENTLY DID SO IN THE *PRESCOTT* AND *FOSTER* CASES, WITH REGARD TO THE ISSUES OF PUBLIC EMPLOYER LIABILITY, FEE PAYERS' STANDING TO CHALLENGE THE FAIR SHARE FEE INDEMNIFICATION AGREE-MENT, AND THE CONSTITUTIONALITY OF THE INDEMNIFICATION AGREEMENT

In their first three Questions Presented, Petitioners seek *certiorari* on the following issues: (1) the liability of public officials for collecting fair share fees under a legally deficient *Hudson* notice; (2) the standing of fee payers to challenge an agreement whereby the union agrees to indemnify the public employer against claims arising from the collection of fair share fees; and (3) the constitutionality of such an indemnification agreement. Pet. at i. Petitioners in *Prescott v. County of El Dorado*, ___ U.S. ___, 123 S.Ct. 1251 (February 24, 2003), represented by the same Right to Work counsel who represents Petitioners in the instant case, sought to raise the second and third of those issues before this Court. The Court, however, denied their Petition for *Certiorari*, just two months ago. *Id.*

Prior to *Prescott*, Petitioners in *Foster v. Garcy*, ___ U.S. ___, 122 S.Ct. 2327 (June 3, 2002), who were also represented by Right to Work counsel, sought to raise the first issue raised here, the liability of public officials for collecting fair share fees under a legally deficient *Hudson* notice. The Court, however, denied their Petition for *Certiorari*, less than one year ago. *Id.*

The Court of Appeals in the present case relied on its prior decision in *Foster v. Madhesian*, 268 F.3d 689 (9th Cir. 2001), *cert. denied sub nom Foster v. Garcy*, 122 S.Ct. 2327 (2002), for its holding that the defendant public officials cannot incur any liability under the facts of this case. *See* Pet. App. A at 18a-19a. Similarly, the Court of Appeals in the present case relied on its prior decision in *Prescott v. County of El Dorado*, 298 F.3d 844 (9th Cir. 2002), *cert. denied*, 123 S.Ct. 1251 (2003), for its holding that Petitioners lack standing to challenge the fair share fee indemnification clause. *See* Pet. App. A at 21a. These are the very decisions as to which this Court recently denied *certiorari*.

Nothing has changed since this Court denied a similar Petition for *Certiorari* on these same issues just two months ago. The Court of Appeals' decision merely applied precedents as to which this Court has already denied *certiorari*. There is no need here to repeat the arguments made by the respondents in *Foster* and *Prescott* as to why *certiorari* is not warranted. Rather, CSEA refers the Court to those arguments and respectfully requests it to deny the Petition in the present case as to the first three Questions Presented for the same reasons that it denied the similar petitions in *Prescott* and *Foster*.

II. PETITIONERS HAVE FAILED TO IDENTIFY A CONFLICT ON THE REMEDIAL ISSUE WARRANTING A GRANT OF *CERTIORARI*

Petitioners' fourth Question Presented seeks *certiorari* as to the Court of Appeals' remedial holding that because CSEA corrected and reissued the *Hudson* notice, gave fee payers a new opportunity to object to or challenge the notice, and provided refunds of the non-chargeable portion of the fee (plus interest) to all who did so in a timely manner—all prior to the entry of summary judgment—CSEA owed no further compensatory relief to the fee payers. *See* Pet. at i; *id.*, App. A at 11a-15a. Petitioners seek to raise two challenges to the Court of Appeals' holding: first, they argue that CSEA was legally required to return to all fee payers all of the fair share fees collected prior to the May 2000 notice; and second, that if such full restitution was not required, then CSEA was legally required to return to all fee payers the non-chargeable portion of the fee collected prior to the May 2000 notice. Pet. at 23-27. The Petition should be denied, however, because Petitioners fail to identify any conflict worthy of *certiorari* that can withstand scrutiny.

A. There Is No Conflict with Regard to Full Restitution to All Fee Payers of the Entire Fair Share Fee. Petitioners first argue that full restitution to all fee payers of all fair share fees collected under a legally deficient *Hudson* notice is mandated by this Court's decision in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986). *See* Pet. at 23-25. They are simply wrong. As Petitioners admit, "*Hudson* declined to specify the appropriate remedy . . . ." Pet. at 23. Petitioners seize on language in *Hudson* to the effect that a union may not "collect[]" fees until it meets the "constitutional requirements" set forth in that decision. *Id.* But this confuses the existence of a legal violation with the separate issue of the appropriate *remedy* for such a violation.

Moreover, to the extent that *Hudson* has any relevance to the remedial issue, it suggests that full restitution of all fees collected would *not* be appropriate. *Hudson* recognized "the important 'principle of exclusive union representation,'" as well the great deference owed to "the congressional judgment that 'it would promote peaceful labor relations to permit a union and an employer to conclude an agreement requiring employees who obtain the benefit of union representation to share its cost.'" *Hudson*, 475 U.S. at 301 n.8 (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 219-20 (1977)). To effectuate this important goal of avoiding "free riders," and at the same time to protect the fee payers' rights, *Hudson* declared that the courts must "'devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto *without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.*'" *Id.*, 475 U.S. at 302 (emphasis added; quoting *Abood*, 431 U.S. at 237).

Clearly, ordering a union to refund the *entire* agency fee collected from each fee payer (not merely the non-chargeable portion) would be to "deprive the union of fees to which it was, doubtlessly, entitled." *Prescott v. County of El Dorado*, 177 F.3d 1102, 1109 (9th Cir. 1999), *vacated and remanded in other part*, 528 U.S. 1111, *reinstated in relevant part on remand*, 204 F.3d 984 (9th Cir. 2000). Full restitution would therefore subvert the goal identified in *Hudson* of avoiding "restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Hudson*, 475 U.S. at 302. Thus, far from the denial of full restitution conflicting with the reasoning of *Hudson*, it is in fact an order of full restitution that would conflict with the reasoning of *Hudson*.

Petitioners are no more successful in attempting to manufacture a conflict between four federal circuits and one state supreme court, on the one hand, and three other state

supreme courts, on the other hand, with regard to the availability of full restitution. *See* Pet. at 26-27. They admit, as they must, "three circuits and one state supreme court deem full restitution inappropriate" as a remedy for a *Hudson* violation. Pet. at 26.[2] They assert, however, that "three state supreme courts have affirmed awards of full restitution." *Id.* While that may be true, it does not create a conflict.

Two of the three state supreme court decisions relied upon by Petitioners arose as appeals from awards issued by state administrative agencies under state law. *See Wareham Educ. Ass'n v. Mass. Labor Relations Comm'n*, 430 Mass. 81 (1999); *Elvin v. Oregon Public Employees Union*, 313 Or. 165 (1992). As such, these decisions concern the authority of a state administrative agency to remedy a violation of state law, rather than the authority of a federal court to remedy a violation of the First Amendment, and any asserted conflict between them and the decision of the Court of Appeals in this case is illusory.[3]

There is also no conflict between the Court of Appeals' decision and the third state supreme court decision relied upon by Petitioners, *Gibney v. Toledo Bd. of Educ.*, 40 Ohio St. 3d 152, 532 N.E.2d 1300 (1988). In *Gibney*, the Ohio Supreme Court's decision awarding restitution to all fee

---

[2] In fact, as demonstrated by the decisions Petitioners cite in support of this admission, *four* federal circuits have endorsed this view. *See id.* (citing cases from the Sixth, Seventh, Ninth and Tenth Circuits).

[3] *See Elvin*, 313 Or. at 167 ("The issue in the present case is one of administrative law—whether [the state agency] exceeded its authority under [the state public collective bargaining law] in ordering [the union] to refund to respondents their fair share payments"); *Wareham*, 430 Mass. at 82-83 ("[F]ollowing a hearing, [the state administrative agency] concluded that the unions' failure to provide audited financial statements was in violation of [Massachusetts General Law chapter] 150E, §§ 12(5) and 10(b)(1). As a result of this conclusion the [agency] ordered the unions to . . . return the withheld fees to the teachers.").

payers of all fair share fees collected relied on two prior Sixth Circuit decisions, *Tierney v. Toledo*, 824 F.2d 1497 (6th Cir. 1987), and *Lowary v. Lexington Local Bd. of Educ.* ("*Lowary I*"), 854 F.2d 131 (6th Cir. 1988). *See Gibney*, 40 Ohio St. 3d 157-58. *Gibney* predicated its decision on the consideration, which it drew from *Tierney* and *Lowary I*, that the union lacked an adequate "plan," i.e., "*procedures*," to meet the constitutional requirements set forth in *Hudson*:

> *Tierney* and *Lowary* [*I*] both involve Section 1983 actions filed by plaintiffs alleging that *procedures* provided to them in connection with the collection of their service fees were constitutionally deficient. Both actions support a holding that service fees may not be collected from nonmembers until a *plan* providing for the constitutionally required procedure set forth in *Hudson*, *supra*, is in effect. The trial court in the action before us found the *plan* in question to be constitutionally insufficient with regard to its *procedures* for refunding service fees and resolving rebate disputes. Thus, the deduction of fees . . . had infringed upon the appellees' First Amendment rights. Restitution of those fees and injunctive relief prohibiting collection of further fees is a proper remedy. *See Lowary* [*I*], *supra*. We therefore find that the relief granted by the trial court in the case at bar was proper.

Gibney, 40 Ohio St. 3d at 158 (emphasis added).

Here, unlike in *Gibney*, there was no dispute about CSEA's "plan" or "procedures" for collecting fees, resolving challenges to the fee, escrowing the amounts in dispute, etc. Clearly, CSEA had "a plan providing for the constitutionally required procedure set forth in *Hudson* . . . in effect." *Id.* As set forth above, the *only* problem with CSEA's June 1999 notice was that CSEA had neglected to attach a copy of the auditor's verification. Indeed, this was at most a technical defect in a pattern of substantial compliance with *Hudson*, since CSEA informed fee payers in the notice that the

financial disclosure set forth therein had been audited, provided the auditor's name, and offered to provide the entire audit upon request. Because there was no constitutionally deficient "plan" at issue here, the issue resolved in *Gibney* was different from that resolved in the present case, and there is no conflict between *Gibney* and the Court of Appeals' decision.

Additionally, *Gibney* relied on two Sixth Circuit decisions, *Tierney* and *Lowary I*. As Petitioners admit, however, the Sixth Circuit subsequently clarified in *Lowary v. Lexington Local Bd. of Educ.* ["*Lowary II*"], 903 F.2d 422, 432-33 (6th Cir. 1990), that full restitution is *not* an appropriate remedy. *See* Pet. at 26. Thus, it is likely that, were the issue to come before it again, the Ohio Supreme Court would no longer follow its prior decision in *Gibney*, but would instead continue follow the federal law as articulated by the Sixth Circuit, this time in its intervening *Lowary II* decision.[4]

B. There Is No Conflict with Regard to Restitution to All Fee Payers of the Non-Chargeable Portion of the Fair Share Fee. Finally, Petitioners argue that the Court of Appeals' refusal to affirm the district court's award of restitution to all fee payers of the non-chargeable portion of the fair share fee conflicts with decisions of the Sixth Circuit in *Lowary II*, 903 F.2d at 432-33, and *Weaver v. Univ. of Cincinnati*, 970 F.2d 1523, 1533-34 (6th Cir. 1992), as well as the Tenth Circuit's decision in *Wessel v. City of Albuquerque*, 299 F.3d 1186, 1194-95 (10th Cir. 2002), and the Wisconsin Supreme

---

[4] Moreover, the *Gibney* court was not faced with the facts presented here, i.e., the union's correction and reissuance of the *Hudson* notice, its extension of the objection/challenge period, and its issuance of refunds with interest to all fee payers who timely objected to or challenged any of its *Hudson* notices. It is sheer speculation to assume that the *Gibney* court would have awarded full restitution in such circumstances.

Court's decision in *Browne v. Wisconsin Employment Relations Comm'n*, 169 Wis. 2d 79, 133 (1992). *See* Pet. at 27.

First, as noted by the Court of Appeals, *Wessel* and *Weaver* actually support the Court of Appeals' holding that no compensatory remedy was warranted or permissible due to CSEA's correction and reissuance of the *Hudson* notice, its extension of the objection/challenge period, and its provision of a refund with interest retroactive to the beginning of the fee year to any fee payer who timely requested one. *See* Pet. App. A at 14a n.2. Thus, in *Wessel*, the "Union issued a corrected Fair Share Notice," and the plaintiff "non-members were refunded the portion of the fair share fee that exceeded what they could properly be charged." *Wessel*, 299 F.3d at 1194. On that basis, the Tenth Circuit held that no further remedy was warranted. *Id.* at 1194-95. As the Court of Appeals pointed out below, each of the *Wessel* plaintiffs had objected to the original notice. *See* Pet. App. A at 14a n.2; *Wessel*, 299 F.3d at 1193.[5] Because CSEA reissued a corrected *Hudson* notice and gave refunds to each objector on its own initiative prior to summary judgment—which is what occurred in *Wessel*—the Court of Appeal's decision that no further compensatory remedy was warranted is in accord with the Tenth Circuit's decision in *Wessel*.

Weaver also supports the Court of Appeals' decision here. In *Weaver*, the Sixth Circuit declared, "Until *Hudson*'s requirements are satisfied, an employee who does not object to paying for nonchargeable items will be allowed subsequent opportunities to object." *Weaver*, 970 F.2d at 1532. Again, this is what happened in the present case: CSEA, on its own initiative, gave fee payers a new opportunity to object and

---

[5] Although captioned as a class action, no class was ever certified in *Wessel* and it was therefore litigated as an individual action brought by the named individual fee payer plaintiffs.

obtain a refund in response to a corrected and reissued *Hudson* notice. Thus, *Weaver* does *not* conflict with the decision below.

Finally, neither the Sixth Circuit's decision in *Lowary II*, 903 F.2d at 432-33, nor the Wisconsin Supreme Court's decision in *Browne*, 169 Wis. 2d at 133, conflicts with the Court of Appeals' decision, due to the simple but incontrovertible fact that neither the Sixth Circuit nor the Wisconsin Supreme Court was presented with the circumstances upon which the Court of Appeals' decision here was based: the union's correction and reissuance of the notice, extension of the objection/challenge period, and provision of a refund with interest retroactive to the beginning of the fee year to any fee payer who timely requested one. The fact that the *Lowary II* and *Browne* courts approved of refunds to all fee payers of the non-chargeable portion of the fee where no such reissuance and opportunity for refund had previously been provided says nothing about whether those courts would find such a remedy appropriate where, as here, it had been provided. In other words, Petitioners' asserted "conflict" is entirely illusory because they are comparing apples and oranges. Because the *Lowary II* and *Browne* courts were faced with an entirely different factual situation than that faced by the Court of Appeals in the present case, the fact that they reached a different result is not surprising, and certainly does not create a "conflict."

CONCLUSION

For the foregoing reasons, the Petition for a Writ of *Certiorari* should be denied.

Respectfully submitted,

ANNE M. GIESE
Chief Counsel
HARRY J. GIBBONS
CALIFORNIA STATE
EMPLOYEES ASSOCIATION,
Local 1000, SEIU,
AFL-CIO, CLC
1108 "O" Street, Suite 327
Sacramento, California 95814
(916) 326-4208

April 2003

STEPHEN P. BERZON
Counsel of Record
JEFFREY B. DEMAIN
EILEEN B. GOLDSMITH
ALTSHULER, BERZON,
NUSSBAUM, RUBIN & DEMAIN
177 Post Street, Suite 300
San Francisco, California 94108
(415) 421-7151

Attorneys for Respondent CSEA,
Local 1000

Supreme Court, U.S.
FILED
JUN 3 2003
OFFICE OF THE CLERK

NO. 02-1493

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

CHRISTINE A. CUMMINGS; JANET TAYLOR DARVAS; RICHARD K. DEHART; CHRISTOPHER GARBANI; PATRICIA A. MCCUMSEY; DANIEL NOWALIS; CLAUDIA STEWART, AND THE CLASS THEY REPRESENT,

Petitioners,

v.

STEVE WESTLEY; MARTY MORGENSTERN; AND CALIFORNIA STATE EMPLOYEES ASSOCIATION, LOCAL 1000, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO-CLC,

Respondents.

On Petition for Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

---

PETITIONERS' REPLY BRIEF

W. JAMES YOUNG*
c/o National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

ATTORNEY FOR PETITIONERS
**Counsel of Record*

June 2003

15 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. PETITIONERS OMIT NO "CRUCIAL" FACTS 1

II. THE COURT'S PRIOR EXERCISE OF ITS DISCRETION IS AN INSUFFICIENT REASON TO DENY *CERTIORARI* ON THE IMPORTANT QUESTIONS PRESENTED BY THE PETITION 3

III. THE CONFLICT AMONG THE COURTS ON THE QUESTION OF APPROPRIATE MONETARY REMEDY IS GENUINE, AND REVIEW BY THIS COURT IS JUSTIFIED 5

CONCLUSION 10

TABLE OF AUTHORITIES

Cases *Page*

ALPA v. Miller,
523 U.S. 866 (1998) 4

Browne v. Wisconsin Employment Relations Comm'n,
485 N.W.2d 376 (Wisc. 1992) 7

City of Riverside v. Rivera,
477 U.S. 561 (1986) 3

Cramer v. Matish,
924 F.2d 1057, 1990 WL 169640 (6th Cir. 1990) 5

Dusenberry v. U.S.,
534 U.S. 161 (2002) 6

Elvin v. Oregon Pub. Employees Union,
832 P.2d 36 (Ore. 1992) 6

Gibney v. Toledo Bd. of Educ.,
532 N.E.2d 1300 (Ohio 1988) 6

Gilpin v. AFSCME,
875 F.2d 1310 (7th Cir. 1989) 7

Hohe v. Casey,
956 F.2d 399 (3d Cir. 1992) 5

Lehnert v. Ferris Faculty Ass'n,
707 F. Supp. 1473 (W.D. Mich. 1988) 1

TABLE OF AUTHORITIES — CONTINUED

Page

Lilly v. Virginia,
527 U.S. 116 (1999) 4

Lowary v. Lexington Local Bd. of Educ.,
903 F.2d 422 (6th Cir. 1990) 7, 8

Prescott v. County of El Dorado,
177 F.3d 1102 (9th Cir. 1999),
cert. granted, vacated, & remanded,
528 U.S. 1111 (2000), *reinstated in part*,
204 F.3d 984 (9th Cir. 2000) 7

Stamford Bd. of Educ. v. Stamford Educ. Ass'n,
697 F.2d 70 (2d Cir. 1982) 5

Teachers Local No. 1 v. Hudson,
475 U.S. 292 (1986) ..... *passim*

Wareham Educ. Ass'n v. Massachusetts Labor Relations Comm'n,
713 N.E.2d 363 (Mass. 1999) 6

Weaver v. University of Cincinnati,
970 F.2d 1523 (6th Cir. 1992) 5, 7, 8

Wessel v. City of Albuquerque,
299 F.3d 1186 (10th Cir. 2002) 5, 7

TABLE OF AUTHORITIES — CONTINUED

Page

Wessel v. City of Albuquerque,
48 Fed. R. Serv. 3d 349,
2000 WL 1803818 (D.D.C. 2000) 8

Constitutions, Statutes, and Rules

U.S. Const., amend. I 4, 9

42 U.S.C. § 1983 4

Sup. Ct. R. 35.3 1

ARGUMENT

I. PETITIONERS OMIT NO "CRUCIAL" FACTS.

The Brief in Opposition of Respondent California State Employees Association, Local 1000, Service Employees International Union, AFL-CIO-CLC ("CSEA"), differs from Respondent Marty Morgenstern's ("Morgenstern's Opp.") only in its attention to the fourth Question Presented. CSEA's Brief in Opposition ("CSEA's Opp."), pp. 1-4, 7-13. Respondent Steve Westley, substituted for Kathleen Connell pursuant to Sup. Ct. R. 35.3, declined to file a separate opposition.

CSEA cites "omitted" facts purportedly "crucial" to this Court's determination as to whether to grant *certiorari* on the fourth Question Presented. CSEA's Opp. at 1-4. CSEA's argument is that, because each of its relevant notices was only a little constitutionally inadequate, the Ninth Circuit was justified when it reversed the District Court order requiring restitution of only the nonchargeable portion of the fee, and refused to order disgorgement of all of the illegally-seized fees.

It is undisputed that each of CSEA's four notices met at least some of the "constitutional requirements for the . . . collection of agency fees." *Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986). CSEA's Opp. at 2. However, that is irrelevant. As at least one court has noted when a union offered a similar argument, "it is clear that a procedure which meets only part of [*Hudson*'s] requirements is constitutionally inadequate." *Lehnert v. Ferris Faculty Ass'n*, 707 F. Supp. 1473, 1477 (W.D. Mich. 1988). And what is "undisputed"—and relevant—is that "[c]onstitutionally-adequate notice and procedures under *Hudson* were not provided to the employees until May 2000. App. [Appendix] C at 25a." Petition at 4.

Like the Ninth Circuit's decision, CSEA's argument assumes that nonmembers are harmed, not by the unconstitutional seizure of fees from their wages, but by the contents of a union's notice and procedures. App. A at 15a. Under this flawed view of this Court's forced-unionism decisionmaking, a tardily-issued notice complying with *Hudson*'s requirements "completely remedied . . . whatever harm fee payers might have incurred through the omission of the auditor's verification." CSEA's Opp. at 2-3.

Equally irrelevant to the period at issue here—*i.e.*, when California's State Controller was seizing on behalf of CSEA agency fees in the absence of the "constitutional requirements for the . . . collection of agency fees," *Hudson*, 475 U.S. at 310—is the purported "good faith" of CSEA,[1] or the fact that "any delay in the issuance of the May 2000 notice was attributable to the district court's interim orders and comments during hearings which failed to provide clear guidance as to what was required." CSEA's Opp. at 3, *quoting* App. E at 41a & App. A at 4a, 15a.

The Ninth Circuit's notion of "good faith" uniquely serves CSEA's pecuniary interests, and defies the facts. It ignores fee seizures for three months absent **any** financial disclosure (pursuant to CSEA's first notice in April 1999). Record ("R.") 1, Exhibit ("Ex.") E. It also ignores fee seizures occurring for another six months pursuant to a second notice, R. 1, Ex. F, that defied this Court's requirement of financial disclosure containing "verification by an independent auditor," *Hudson*, 475 U.S. at 307 n.18. Both notices were constitutionally deficient because

---

[1] CSEA was never found to have "acted in good faith at all times." CSEA's Opp. at 2. The "good faith" found by the courts below was noted only in reference to CSEA's behavior after being hailed into court. App. A at 15a.

"they . . . failed to provide a copy of the Audit in the absence of a fee payer's formal request." App. E at 38a.[2]

The lower courts' adjudication offends even primitive notions of justice insofar as it visits upon Petitioners the costs of the District Court's error. Even if the source of some of CSEA's errors can fairly be traced to the District Court—prompted, of course, by CSEA's arguments—due process is not satisfied when those wronged by CSEA must bear their costs. *Cf. City of Riverside v. Rivera*, 477 U.S. 561, 580 n.11 (1986) ("Those who elect a militant defense . . . . cannot now disclaim the consequences of their actions," in context of attorneys' fees).

II. THE COURT'S PRIOR EXERCISE OF ITS DISCRETION IS AN INSUFFICIENT REASON TO DENY *CERTIORARI* ON THE IMPORTANT QUESTIONS PRESENTED BY THE PETITION.

By failing to address the arguments presented in the Petition, Respondents CSEA and Morgenstern virtually concede the serious conflicts presented by the decision below on the first three Questions Presented. Respondents CSEA and Morgenstern posit only that "[n]othing has changed since this Court denied a similar Petition for *Certiorari* on these same issues just two months ago." Morgenstern's Opp. at 3; CSEA's Opp. at 6.

What has changed, however, is that the Ninth Circuit has for a **third time** flouted this Court's decisionmaking and conflicted

---

[2] CSEA's argument that the second notice was adequate because the figures contained in it were "taken from the independent audit of CSEA's 1998 financial records," R. 1, Ex. F— even though the auditor's report on those financial records was not included—finds no support in any of the caselaw under *Hudson*. App. A at 5a-8a.

with multiple Circuits on multiple issues. *Certiorari* is justified as to the first three Questions Presented for the same reasons that this Court agreed to review the decision of the United States Court of Appeals for the Seventh Circuit in *Hudson*, 475 U.S. at 300: because of "the importance of the case, and the divergent approaches of other courts to the issue[s]."

As to the first Question Presented, addressing public official liability for seizing agency fees in violation of 42 U.S.C. § 1983, the panel's decision apparently conflicts with this Court's decision in *Hudson*, 475 U.S. at 307 n.20 ("the government and union have a responsibility to provide procedures that minimize th[e] impingement [on First Amendment rights] and that facilitate a nonunion employee's ability to protect his rights"). It constitutes a "significant departure" from this Court's standing jurisprudence generally and from its forced-unionism jurisprudence particularly. *Lilly v. Virginia*, 527 U.S. 116, 123 (1999) (concern led to grant of *certiorari*). *See* Pet. at 10-17. Moreover, it conflicts with multiple Circuits on multiple issues, particularly as to the panel's peculiar holding that it is the contents of a union's notice—and not the seizure of their wages—which injures nonmembers' constitutional rights. *See ALPA v. Miller*, 523 U.S. 866, 876 n.4 (1998) (rejecting notion that violation occurs only upon union's expenditure of funds, not upon collection).

The Ninth Circuit's immunization of public officials against liability where they seize monies for labor unions from public employees' wages, App. A at 18a, is a new and unprecedented immunity. No authority from any other context supports the panel's decision, which radically departs from virtually every court's understanding of traditional immunity defenses under 42 U.S.C. § 1983. Moreover, it conflicts with the decisions of at least four circuits and one state Supreme Court deciding cases in the same context. *See* Petition at 14-15, ***and cases cited therein.***

Likewise, the panel's opinion on the standing of employees to challenge one of the terms of the monopoly bargaining agreement governing their terms and conditions of employment (second Question Presented) directly conflicts with *Wessel v. City of Albuquerque*, 299 F.3d 1186, 1197-99 (10th Cir. 2002), and with the implicit standing determinations of *Hohe v. Casey*, 956 F.2d 399, 405-06, 411 (3d Cir. 1992) (adjudicating similar challenges to indemnification provisions), and *Weaver v. University of Cincinnati*, 970 F.2d 1523, 1538 (6th Cir. 1992) (same).

Finally, the Circuits are badly divided as to the third Question Presented, addressing whether a labor union's indemnification of a public employer for the public employer's constitutional torts for the financial benefit of a labor union violates public policy. Two Circuits hold indemnification clauses in the context of forced-unionism schemes to be void as against public policy. *Wessel*, 299 F.3d at 1197-98 (Tenth Circuit); *Weaver*, 970 F.2d at 1538 (Sixth Circuit); *see also Cramer v. Matish*, 924 F.2d 1057 (table), 1990 WL 169640, at *4 (6th Cir. 1990) (same). A third agrees in a related context. *Stamford Bd. of Educ. v. Stamford Educ. Ass'n*, 697 F.2d 70, 74 (2d Cir. 1982). Only the Third Circuit has declined to declare such clauses void as against public policy. *Hohe*, 956 F.2d at 411-12.

III. The Conflict Among the Courts on the Question of Appropriate Monetary Remedy Is Genuine, and Review by This Court Is Justified.

CSEA alone opposes the Petition's fourth Question, seeking review of the lower courts' refusal to order disgorgement of all fees seized prior to compliance with "the constitutional requirements for the . . . collection of agency fees," *Hudson*, 475 U.S. at 310, and the panel's reversal of the District Court's order that

CSEA refund the nonchargeable portion of fees seized for the thirteen months prior to its compliance with *Hudson*'s requirements. CSEA fails to discredit the contention that there is a widespread and two-fold division among the courts (both Circuit courts and state supreme courts) on this remedial issue.

CSEA concedes, as it must, that three state supreme courts have affirmed awards of full restitution when unions failed or refused to comply with *Hudson*'s requirements. *Elvin v. Oregon Pub. Employees Union*, 832 P.2d 36, 41-44 (Ore. 1992); *Wareham Educ. Ass'n v. Massachusetts Labor Relations Comm'n*, 713 N.E.2d 363, 368 (Mass. 1999); *Gibney v. Toledo Bd. of Educ.*, 532 N.E.2d 1300, 1306 (Ohio 1988). Contrary to CSEA's suggestion, neither *Wareham* nor *Elvin* turns wholly on deference jurisprudence. Both analyze the underlying statutory and constitutional principles to affirm those orders, *Wareham*, 713 N.E.2d at 368; *Elvin*, 832 P.2d at 41-42. Neither does the illusory distinction that CSEA posits between a union's "notice" and its "procedures" diminish the conflict posed by the Ohio Supreme Court's decision in *Gibney*.[3]

CSEA also does not seriously dispute that the Ninth Circuit's reversal of the District Court's award of the nonchargeable portion of the seized fees conflicts with three circuits and one

---

[3] Consistent with its canard that a notice's content harms nonmembers, CSEA expends nearly a page discussing a false dichotomy between "an adequate 'plan', i.e., '*procedures*,'" and its failure or refusal (euphemized as "neglect[]") to "attach a copy of the auditor's verification. . . . at most a technical defect in a pattern of substantial compliance with *Hudson*." CSEA's Opp. at 10 (original emphasis). Nowhere in its jurisprudence has this Court suggested that adequate notice is not a necessary part of constitutionally-adequate procedures. *See Hudson*, 475 U.S. at 306-10; *see also Dusenberry v. U.S.*, 534 U.S. 161, 167 (2002) (notice is one element required under due process clause).

state supreme court. *Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 432-33 (6th Cir. 1990); *Weaver*, 970 F.2d at 1533-34; *Gilpin v. AFSCME*, 875 F.2d 1310, 1313-14 (7th Cir. 1989); *Wessel*, 299 F.3d at 1194-95; *Browne v. Wisconsin Employment Relations Comm'n*, 485 N.W.2d 376, 397-99 (Wisc. 1992); *cf. Prescott v. County of El Dorado*, 177 F.3d 1102, 1109 (9th Cir. 1999), *cert. granted, vacated, & remanded on other grounds*, 528 U.S. 1111 (2000), *reinstated in pertinent part*, 204 F.3d 984 (9th Cir. 2000) (same). Rather, CSEA argues that its subsequent remedial measures make this case sufficiently distinct to warrant the Ninth Circuit's departure from those decisions.

Those decisions are not distinguishable. *Wessel*'s rejection of an additional remedy was not rooted in the nonmembers' prior objections, but rather, in the court's conclusion that a "union's violation of procedural requirements for the collection of fair share fees does not entitle nonmembers to a 'free ride' but only to a refund of the portion of the amounts collected that exceed what could be properly charged." 299 F.3d at 1194-95. *Wessel*'s reference to the fact that some nonmembers had already objected was merely made in reference to the court's rejection of the defendants' argument that the non-members lacked standing to challenge the adequacy of the union's notice and procedures. *Id.* at 1193, *cited at* App. A at 14a n.2.

The Ninth Circuit incorrectly assumed that the *Wessel* plaintiffs "all objected to the initial notice." App. A at 14a n.2. Although not apparent from the Tenth Circuit's opinion, only eight of the thirteen *Wessel* plaintiffs objected to the initial notice, but the union there refunded the nonchargeable portion of the fees to all thirteen (and all other nonmembers) when it issued its revised notice. *Wessel v. City of Albuquerque*, 48 Fed. R. Serv. 3d 349, 2000 WL 1803818, at *1-*2 (D.D.C. 2000). Thus, *Wessel* is directly on point and directly contrary to the Ninth Circuit's

holding that not even the nonchargeable portion of the fees should be refunded to all Petitioners.

Neither does *Weaver* support CSEA's argument. CSEA cites a portion of the decision rejecting a challenge to the requirement that nonmembers object in order to avoid being subjected to fee seizures equal to full union dues. *Weaver*, 970 F.2d at 1532 (Part V), *cited at* CSEA's Opp. at 12. The portion of *Weaver* that addresses the appropriate monetary remedy appears in the next section. It reaffirms *Lowary*'s holding that " 'the proper remedy for an unconstitutional fee collection is not a refund of the total fee,' but is the refund of the portion of the exacted fees proportionate to the union's nonchargeable expenditures." 970 F.2d at 1533 (Part VI.A), *quoting Lowary*, 903 F.2d at 433.

As to the merits, CSEA offers little more than sophistry, asserting that Petitioners "confuse[] the existence of a legal violation with the separate issue of the appropriate *remedy* for such a violation." CSEA's Opp. at 7. CSEA concedes that "language in *Hudson* [is] to the effect that a union may not 'collect[]' fees until it meets the 'constitutional requirements' set forth in that decision." *Id.* (*quoting* 475 U.S. at 310). How, then, can permitting CSEA to retain fees seized when it had not complied with "the constitutional requirements for the . . . collection of agency fees," 475 U.S. at 310, be consistent with *Hudson*?

CSEA ignores the consequences clearly implicit in *Hudson*'s holding that there are "constitutional requirements for the . . . collection of agency fees." 475 U.S. at 310. CSEA conflates that holding with this Court's reasoning allowing forced-unionism provisions, quoting this Court's *precis* as to what it was trying to accomplish in *Hudson*—to "'devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto *without restricting the Union's ability to require every*

employee to contribute to the cost of collective-bargaining activities.'" CSEA's Opp. at 8, *quoting* 475 U.S. at 302 (CSEA's emphasis). However, CSEA begs the question, because it fails to recognize that this Court there was discussing the circumstances under which unions may compel nonmembers' financial support, not circumstances—such as those presented here—where a union has defied the "constitutional requirements" and an appropriate remedy must be devised.

What CSEA refuses to recognize—like the panel below, when it refused to order disgorgement and reversed the District Court's order for partial restitution—is that the "refund of the *entire* agency fee" Petitioners seek does not "subvert the goal identified in *Hudson*," CSEA's Opp. at 8. To the contrary, *Hudson*'s properly-identified and principal goal of guaranteeing adequate notice and procedural safeguards to protect nonmembers' First Amendment rights is subverted by courts which allow unions to retain fees seized in defiance of *Hudson*'s mandate.

This case is particularly compelling in this regard. CSEA's cost in preparing and distributing the requisite annual financial disclosure—**after** two inadequate notices had already been prepared and distributed—was only approximately $12,000. R. 33. That is miniscule compared to the approximately $13 million realized annually upon imposition of the forced-unionism agreement upon Petitioners. CSEA's cost of complying with *Hudson*'s requirements was less than one-tenth of one percent of its expected profit from doing so. Rather than making an investment minimal in relation to its anticipated gains, CSEA gambled on the likelihood that nonmembers would not pursue their rights. And even when it lost that gamble, the courts below imposed no real cost upon CSEA for its defiance of *Hudson*'s simple and relatively inexpensive mandate. It is an iron law of economics that reducing costs promotes more of an activity.

Courts refusing to require the restitution sought by Petitioners here have so reduced the costs of *Hudson* defiance that labor unions and public employers have little disincentive to illegal conduct.

Thus, even an economic calculus that should have compelled CSEA's scrupulous compliance with *Hudson*'s mandate was ignored. Such a calculus will continue to be ignored so long as federal courts are permitted to deny meaningful economic relief to nonmembers subjected to agency fee seizures that have not been rendered lawful by strict adherence to *Hudson*'s simple requirements.

CONCLUSION

For the reasons stated above, this petition for writ of *certiorari* should be granted, and the case set for plenary briefing and argument on the important questions it presented.

Respectfully submitted,

W. JAMES YOUNG*
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

ATTORNEY FOR PETITIONERS
*Counsel of Record

June 2003